

FEDERAL PUBLIC DEFENDER

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ADDITIONAL RESOURCES

For those of you who have the stomach to read more law after suffering through this Newsletter, you are hereby invited to visit our website at <http://www.gcfeb.com/fpdo/> to view an index of the criminal cases decided by the Sixth Circuit in 2000 as well as a primer that will assist you in navigating the thicket created by the AEDPA. Once you arrive at the home page of our website, merely click on the pertinent button and let the law roll down.® These documents were prepared by another defender office that practices within the Sixth Circuit.

We are also compiling a database which will contain the E-Mail addresses of our loyal readers. Please send me your E-Mail address at S.Nolder@gcfeb.com your address will be added to the database. This will enable us to more efficiently inform you of relevant updates and practice pointers when they become available. Finally, to service you

At the trial, the state bears the burden of proving beyond a reasonable doubt that the defendant is a sexually violent predator. If the person is found to be a sexually violent predator, he is committed for control, care,

better, if you would like the Newsletter sent to you at your E-Mail address, please specify this on your note.

RECENT SUPREME COURT DECISIONS

Seling v. Young, 121 S. Ct. 727 (2001).

The State of Washington's Community Protection Act of 1990 (Act) authorizes the civil commitment of Asexually violent predators.® A predator is defined as a person who suffers from a mental abnormality or a personality disorder that makes him likely to engage in predatory acts of sexual violence.

The Act applies to individuals who have committed a violent sex offense and who are about to be released from confinement. The prosecuting attorney can file a petition alleging that the person is a sexually violent predator. That filing triggers a process for charging and trying the person as a sexually violent predator during which he is afforded a panoply of protections including the right to: counsel, the appointment of experts, a probable cause hearing, and a trial by a judge or jury.

and treatment to the custody of the Department of Social and Health Services. Once confined, the individual is entitled to an annual examination of his mental condition. If that examination indicates that the

individual's condition is so changed that he is no longer likely to engage in predatory acts of

Young was convicted of six rapes over three decades and one day prior to his scheduled release, a petition was filed to commit him as a sexually violent predator. At the trial, experts testified on behalf of both Young and the state and the jury concluded that Young was a sexually violent predator. Young appealed the verdict and argued that the Act violated the Double Jeopardy, *Ex Post Facto* and Equal Protection Clauses of the Constitution. However, the state appellate courts found that the Act was civil in nature and rejected Young's arguments. Young then filed a habeas petition pursuant to ' 2254 and contended that the Act was unconstitutional and that his confinement was illegal.

In *Kansas v. Hendricks*, 521 U.S. 346 (1997) the Court held that Kansas's Sexually Violent Predator Act, on its face, met substantive due process requirements, was civil and not punitive, and thus did not violate either the Double Jeopardy or *Ex Post Facto* Clauses. After *Hendricks* was decided, the district court denied Young's petition and he appealed to the 9th Circuit.

The 9th Circuit affirmed the district court's ruling that Young's confinement did not violate either substantive or procedural due process or equal protection of the laws. However, the 9th Circuit reversed the district court's determination that because the Act was civil and not punitive, Young's double jeopardy and *ex post facto* claims must fail. Instead, the court held that the Act could be punitive as applied to Young because the actual conditions of confinement could divest a facially valid statute of its civil label upon a showing by the clearest proof that the statutory scheme was punitive in effect.

Thus, the case was remanded to the district court for an evidentiary hearing as to whether the conditions at the center where Young was committed rendered the Act punitive as applied. The Warden appealed to the United States Supreme Court.

The Supreme Court found that the Act was strikingly similar to the commitment

Glover then filed a motion to correct his sentence pursuant to 28 U.S.C. ' 2255. In

sexual violence, state officials must authorize the person to be conditionally released.

scheme it reviewed in *Hendricks*. The Court held that a statute, found to be civil, cannot be deemed punitive as applied to a single individual.

The particular features of confinement may affect how a confinement scheme is evaluated to determine whether it is civil or punitive. However, the civil nature of the confinement scheme cannot be altered based merely on vagaries and the implementation of the authorizing statute. Thus, the Supreme Court rejected the 9th Circuit's as applied analysis for double jeopardy and *ex post facto* claims as fundamentally flawed.

The Washington Courts had already determined that the Act was civil in nature and was designed to incapacitate and treat. Accordingly, due process only required that the conditions and duration of confinement under the Act bear some reasonable relation to the purpose for which persons were committed.

Glover v. United States, 121 S. Ct. 696 (2001).

Glover was convicted of labor racketeering, money laundering, and tax evasion and the probation officer recommended the grouping of these counts under USSG ' 3D1.2. However, the government opposed this recommendation and the district court found that the counts should not be grouped. Glover's attorneys did not object to this conclusion and the decision not to group the counts increased Glover's offense level by two levels.

The same attorneys who (mis)represented Glover at the district court also (mis)represented him on appeal to the 7th Circuit and they failed to raise the grouping issue. Shortly after oral argument was held on Glover's appeal, a different panel of the 7th Circuit held that under some circumstances, grouping money laundering offenses with other counts is permissible under ' 3D1.2. Approximately 45 days later, the 7th Circuit affirmed Glover's conviction and sentence.

Glover's *pro se* motion, he argued that his counsel's failure to litigate the grouping issue

was ineffective assistance of counsel. Moreover, Glover maintained that absent this ineffective assistance, his offense level would have been two levels lower and would have yielded a guideline range that was between 6 and 21 months lower than that imposed.

The district court denied Glover's motion and found that an increase of a defendant's sentence of between 6 and 21 months was not significant enough to amount to *Aprejudice* under *Strickland v. Washington*, 466 U.S. 668 (1984). The 7th Circuit affirmed. The lower court decisions were based on *Lockhart v. Fretwell*, 506 U.S. 364 (1993), in which the Court held that in some circumstances, a mere difference in outcome will not establish prejudice. Thus, the lower courts in Glover found that he was not entitled to relief when the increase in his sentence was not so significant as to render the outcome of sentencing unreliable or fundamentally unfair.

However, the Supreme Court found that the lower courts were incorrect in relying on *Lockhart* to deny relief to Glover. Instead, the Court held that a defendant attacking his sentence can show deficient performance and prejudice by establishing that his counsel's failure to object to an error in law led to an increase in his sentence. The Court rejected the government's argument that the defendant was obligated to establish some base line standard of prejudice. Instead, the Court found that any increase in the amount of actual jail time has 6th Amendment significance. Therefore, the judgment of the 7th Circuit was reversed.

Fiore v. White, 121 S. Ct. 712 (2001).

Fiore was convicted of violating a Pennsylvania statute prohibiting the operation of a hazardous waste facility without a permit. The Pennsylvania Supreme Court refused to review Fiore's direct appeal. After Fiore's conviction became final, the Pennsylvania Supreme Court interpreted the same criminal statute for Fiore's co-defendant and made it clear that Fiore's conduct was not illegal under the statute. Nonetheless, Pennsylvania courts refused to grant Fiore collateral relief. Fiore then filed a petition for a writ of habeas corpus which was granted by the district court

but the 3rd Circuit reversed. The 3rd Circuit reversed because it held that the Pennsylvania Supreme Court, in Fiore's co-defendant's case, announced a new rule of law that was inapplicable to Fiore's already final conviction. The 3rd Circuit held that Astate courts are under no federal constitutional obligation to apply their decisions retroactively.

The United States Supreme Court certified the following question to the Pennsylvania Supreme Court: Did the interpretation of the hazardous waste statute in Fiore's co-defendant's case Astate the correct interpretation of the law of Pennsylvania on the date that Fiore's conviction became final?

In response, the Pennsylvania Supreme Court replied: The decision in Fiore's co-defendant's case Adid not announce a new rule of law. Our ruling, merely clarified the plain language of the statute. Thus, the interpretation of the statute by the Pennsylvania Supreme Court in Fiore's co-defendant's case Afurnished the proper statement of law on the date Fiore's conviction became final.

The Supreme Court ruled that because the subsequent case did not announce a new rule of law, the case presented no issue of retroactivity. Rather, the question was simply whether Pennsylvania can, consistently with the Federal Due Process Clause, convict Fiore for conduct that the Pennsylvania Supreme Court had properly held was not prohibited by the criminal statute.

The United States Supreme Court held that Fiore's conviction and continued incarceration violated due process. The Due Process Clause of the 14th Amendment forbids a state from convicting a person of a crime without proving the elements of that crime beyond a reasonable doubt. In this case, the failure to possess a permit was a basic element of the crime for which Fiore was convicted. The Commonwealth conceded that Fiore possessed a permit and, by implication, it conceded that it could not prove that he failed to possess one. Thus, the judgment of the 3rd Circuit was reversed.

Lopez v. Davis, 121 S. Ct. 714 (2001).

One of the few ways that a defendant in federal custody can reduce his sentence is if he successfully completes a drug treatment program while in the custody of the BOP. If the defendant successfully completes the program and otherwise meets the BOP criteria, he can receive up to a one year reduction of the sentence imposed by the district court. Prior to 1997, defendants who possessed firearms during the course of their criminal conduct were *Violent* offenders in the eyes of the BOP. Thus, under the BOP definition, these offenders were denied early release because they were unable to meet the statutory eligibility requirements found in 18 U.S.C. ' 3621(e)(2)(B). However, because of a split in the circuits as to the reasonableness of the BOP's definition of violent behavior, in 1997, the BOP issued 28 CFR ' 550.58(a)(1)(vi)(B) to address this issue.

According to the BOP's new approach to this problem, drug traffickers who possessed firearms when they engaged in crimes were no longer characterized as *Violent* offenders within the meaning of ' 3621(e)(2)(B). Instead, under the new CFR that was promulgated, the BOP categorically denied early release to individuals who possessed firearms during the commission of their offenses. The decision to categorically deny early release to those who possessed firearms was based on the *discretion* allotted to the director of the BOP in granting a sentence reduction to exclude enumerated categories of inmates.

In 1997, Lopez was convicted of possession with intent to distribute methamphetamine. During the commission of this offense, Lopez possessed a firearm in connection with the offense and he received a two level enhancement to his guideline offense level under USSG ' 2D1.1(b)(1).

While incarcerated, Lopez requested substance abuse treatment. Even though Lopez qualified for the BOP's drug treatment program, the BOP declared that he was categorically ineligible for early release because of his possession of a firearm during his offense of conviction. When notified that

The Supreme Court concluded that Congress' use of the permissive *may* in '

he would not be a candidate for early release, Lopez challenged the BOP's determination by filing a petition for writ of habeas corpus pursuant to 28 U.S.C. ' 2241. The district court granted Lopez's petition and the 8th Circuit reversed.

18 U.S.C. ' 3621(e)(2)(B) provides: *The period that a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the BOP.* Thus, the statute, on its face, denies early release eligibility to inmates convicted of violent offenses. The question presented by this case was whether the BOP had the discretion to delineate, as an additional category of ineligible inmates, those whose current offense is a felony involving a firearm as contained in 28 C.F.R. ' 550.58(a)(1)(vi)(B).

Lopez argued that by identifying a class of inmates ineligible for sentence reductions under ' 3621(e)(2)(B), (i.e. those convicted of a violent offense), Congress barred the BOP from identifying further categories of ineligible inmates. In contrast, the BOP argued that ' 3621(e)(2)(B) establishes two prerequisites for a sentence reduction: conviction of a nonviolent offense and successful completion of drug treatment. If those prerequisites are met, the BOP *may* but also *may not*, grant early release. According to the BOP, Congress simply *did not* address how the Bureau should exercise its discretion within the class of inmates who satisfy the statutory prerequisites for early release.

Because Congress left the question unaddressed, the BOP maintained that the agency may exclude inmates either categorically or on a case-by-case basis, subject to its obligation to interpret the statute reasonably. The Bureau contended that its denial of early release to all inmates who possessed a firearm in connection with their offenses of conviction was reasonable because it rationally reflected the view that such inmates displayed a readiness to endanger another's life.

3621(e)(2)(B) contrasts with the legislature's use of a mandatory *shall* in the very same

section. In ' 3621, Congress used Ashall@ to impose discretionless obligations including the obligation to provide drug treatment when funds are available. Sensibly read, the Court found that the grant of discretion in ' 3621(e)(2)(B) to decide whether to reduce a sentence parallels the grant of discretion in ' 3621(e)(2)(A) to retain a prisoner who successfully completes drug treatment under such custodial conditions as the BOP deems appropriate. When an eligible prisoner successfully completes drug treatment, the BOP has the authority, but not the duty, both to alter the prisoner's conditions of confinement and to reduce his term of imprisonment.

Where Congress enacts a law that does not answer the precise question at issue, the Court must decide whether the BOP, the agency empowered to administer the early release program, has filled the statutory gap in a way that is reasonable in light of the legislature's revealed design. In this case the Court approved the BOP's decision to categorically exclude prisoners based on their pre-conviction conduct and found that the exclusion as applied to Lopez was reasonable.

Indianapolis v. Edmond, 121 S. Ct. 447 (2000).

The city of Indianapolis operated motor vehicle checkpoints on its roads with the sole purpose of interdicting narcotics. The police stopped a predetermined number of vehicles. Pursuant to written directives issued by the Chief of Police, at least 1 officer approached each vehicle, advised the driver that he was being stopped briefly at a drug checkpoint, and asked the driver to produce a license and registration. The officer looked for signs of impairment and conducted a visual examination of the vehicle from the outside. A narcotics detection dog then walked around the outside of each vehicle. The written directives instructed the officers that they were permitted to search the vehicle after either obtaining the consent of the driver or developing the appropriate quantum of particularized suspicion during the encounter.

The total duration of each stop was five minutes or less. The checkpoints were generally operated during daylight hours and

were identified with lighted signs that read ANarcotics Checkpoint Ahead, Narcotics Canine in Use, Be Prepared to Stop.@ During the period that these roadblocks operated, drugs were found in approximately 9% of the cars that were encountered.

Edmond was stopped at a checkpoint and based on this experience, he filed suit seeking to enjoin Indianapolis from using the checkpoints in the future. Edmond argued that the checkpoints violated his 4th Amendment right to be free from unreasonable searches and seizures. The district court found that the checkpoints did not violate the 4th Amendment but the 7th Circuit reversed. The Supreme Court affirmed the decision of the 7th Circuit.

The Supreme Court ruled that a search and seizure is normally unreasonable in the absence of individualized suspicion of wrongdoing. However, there is a very limited class of cases where suspicion is not a requirement. Even in the cases where the Court approved searches that were not based on reasonable suspicion, it had never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing because a general interest in crime control has never been a justification for a regime of suspicionless stops. In this case, because the primary purpose of the Indianapolis narcotics checkpoint program was to uncover evidence of ordinary criminal wrongdoing, the program contravened the 4th Amendment.

Cleveland v. United States, 121 S. Ct. 365 (2000).

The mail fraud statute, 18 U.S.C. ' 1341, proscribes the use of the mails in furtherance of any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises. Cleveland, a lawyer, assisted Fred Goodson and his family in applying for a gaming license. However, the government alleged that Cleveland and Goodson violated ' 1341 by misrepresenting the true owners of the corporation in whose name the initial license application and three renewal applications were made. The application and the renewals were all mailed

by Cleveland to the Louisiana State Police.

Cleveland moved to dismiss the mail fraud counts on the ground that the alleged fraud did not deprive Louisiana of property as required by ' 1341. The district court rejected Cleveland's argument after finding that the licenses were property even before they were issued. Cleveland was convicted of two counts of mail fraud and money laundering and sentenced to prison and the 5th Circuit affirmed his conviction.

The Supreme Court reversed after finding that the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property.® The government argued that for purposes of the mail fraud statute, a government regulator parts with property when it issues a license. However, the Court found that ' 1341 does not punish fraud in obtaining a state or municipal license because such a license is not property in the government regulator's hands. The Court held that equating the issuance of licenses or permits with the deprivation of property would subject federal mail fraud prosecutions to a wide range of conduct traditionally regulated by state and local authorities.

Artuz v. Bennett, 121 S. Ct. 361 (2000).

In this case the Court gave meaning to the phrase 'properly filed' as found in 28 U.S.C. ' 2244(d)(2). This statute provides that the time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation.® Therefore, the AEDPA's statute of limitations and grace period are tolled during the time that a 'properly filed' application for state post-conviction relief is pending.

The government argued that an application for state post-conviction or collateral review is not 'properly filed' for purposes of ' 2244(d)(2) unless it complies with all mandatory state law procedural requirements. According to the government, a petition that was subject to a mandatory

Four months later, another competency hearing was conducted at which Dr. Noelker

procedural bar would not be properly filed. The Supreme Court's decisions and the Court's acceptance are in compliance with the applicable laws and rules governing filings. Whether a document is properly filed has nothing to do with the substance of the claims found in the document. Thus, the question of whether an application has been properly filed is a separate issue from the question as to whether the claims contained in the application are meritorious and free from procedural bar.

The Court found that an application for state post-conviction relief containing procedurally barred claims is not improperly filed under ' 2244(d)(2). The state procedural bars that could be raised present hurdles to obtaining relief rather than conditions to filing. Therefore, the Court concluded that the district court erred by holding that Bennett's post-conviction petition was not properly filed.

RECENT SIXTH CIRCUIT DECISIONS

Gall v. Parker, 231 F.3d 265 (6th Cir. 2000).

Gall raped and killed a 12 year old girl as she was en-route to school. Because there was a question of Gall's competency to stand trial, the court appointed a psychologist, Dr. Noelker, to evaluate Gall's competency. Dr. Noelker concluded that although Gall's verbal intelligence was high, he was a severely disturbed individual with a paranoid schizophrenic personality disorder. Nonetheless, Dr. Noelker concluded that Gall was competent to stand trial. Not surprisingly, the Commonwealth's expert, Dr. Chutkow, also concluded that Gall was competent.

Gall claimed that he could not recall his actions or whereabouts during the time that the girl was raped and killed. However, when the two psychologists attempted to assess the veracity of Gall's claim of amnesia, he refused to cooperate and claimed that he was a prisoner of war. Based on the testimony of the psychologists, the trial court concluded that Gall was competent to stand trial.

again testified that Gall was competent. Ten days later during *voir dire*, Gall informed the

trial court that he wanted to play a more active role in his defense which included the cross-examination of witnesses. Gall also informed the court that he understood that his actions might compromise his insanity defense. At the trial, Dr. Noelker observed Gall's behavior and notified Gall's counsel that Gall was no longer competent.

At a hearing on this issue, Dr. Noelker testified that Gall was no longer capable of rationally participating in his own defense and/or assisting his attorney in preparing his defense. Dr. Noelker opined that even though Gall understood the proceedings, he did not understand them as they related to himself because he now believed that he was a defense attorney. Nonetheless, the trial court concluded that Gall was capable of assisting his counsel but ordered another competency examination that was completed by Dr. Lanter.

Dr. Lanter testified that Gall was competent and the trial court adopted this conclusion. Defense expert, Dr. Toppen, a psychiatrist who examined Gall, testified that Gall was in a psychotic paranoid schizophrenic state when he committed the rape and murder and lacked the capacity to conform his behavior to the requirements of the law. Dr. Chutkow testified by video-taped deposition on behalf of the Commonwealth that Gall had no schizophrenic symptoms and that his claim of amnesia was a conscious decision to remain silent after his arrest. Dr. Chutkow even opined that Gall was sane despite the fact that he did not evaluate Gall for the issue of sanity.

Gall was convicted and sentenced to death, exhausted his state appeal rights, and filed a ' 2254 petition which was dismissed by the district court. Gall then appealed to the 6th Circuit. Gall argued that he was denied due process because he was not competent to stand trial and the trial court should not have permitted Gall to represent himself. To be competent, a defendant must have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and must have a rational as well as factual understanding of the proceedings against him. The level of competence needed to waive

one's right to counsel is the same as that needed to stand trial. However, a trial judge must find that a defendant's waiver of counsel is a knowing and voluntary act. This determination centers on whether the defendant understands the significance and consequences of a particular decision and whether the decision was uncoerced.

The 6th Circuit concluded that the records supported the trial judge's conclusion that Gall was competent to stand trial. Moreover, the court also concluded that Gall was competent to waive his right to counsel. The trial court warned Gall of the dangers and disadvantages of self-representation so the record established that he knew what he was doing and his choice was made with eyes open.®

Gall next claimed that his conviction violated due process because the Commonwealth failed to prove an absence of Aextreme emotional disturbance® (EED) beyond a reasonable doubt. Gall argued that the absence of EED was an element of murder under Kentucky law. If the issue was an element of the offense, the Commonwealth may not shift the burden of proof to the defendant. However, if the issue was not an element and does not negate an element, the Commonwealth can properly shift the burden of proving this fact onto the defendant.

Under the Kentucky murder statute that existed at the time of this crime, the court found that the absence of EED was an element that the Commonwealth needed to prove. Furthermore, the court concluded that the Commonwealth did not meet its burden of showing an absence of EED beyond a reasonable doubt. Instead, Gall made an affirmative showing of EED by eliciting testimony that he suffered from a severe psychotic disorder. Furthermore, the Commonwealth failed to rebut the showing of EED. Although Dr. Chutkow stated his belief that Gall did not have a particular form of paranoid schizophrenia on the day of the crime and could appreciate the criminality of his conduct, Dr. Chutkow at no point disputed the showing that Gall suffered from a psychotic disorder sufficient to constitute an EED.

Gall next argued that his due process rights were violated because the evidence produced at trial clearly showed that he was insane. The 6th Circuit rejected this argument and found that a state prisoner is entitled to habeas relief under ' 2254 only if he is held in custody in violation of the Constitution, laws, or treaties of the United States. Thus, a challenge to a conviction must do more than pose a question of state law because this type of challenge does not allege a deprivation of federal rights. Therefore, challenges to evidence that do not constitute elements do not implicate constitutional questions. In Kentucky, sanity was not an element of murder and insanity does not negate an element of murder. Therefore, the court found that this argument was not cognizable on habeas review.

Gall also argued that in rejecting his challenge for cause to Juror Barton, the trial court violated his right to an impartial jury under the 6th and 14th Amendments. The substantive standard that applies to juror challenges when a habeas petitioner is attacking a state court conviction is that a federal court will not presume unfairness of a constitutional magnitude in the absence of particularly egregious circumstances.@ Thus, qualified jurors do not need to be totally ignorant of the facts and issues involved. Instead, a prospective juror must be able to lay aside his impression or opinion and render a verdict based on the evidence presented in the court. However, a juror is not properly seated if at *voir dire*, he exhibits such hostility toward a defendant as to suggest a partiality that could not be laid aside.@

The different factors that must be weighed in making a determination as to whether a juror is fit for service include: (1) the nature of the information that the juror knew; (2) how probative the information was as to the defendant's guilt; (3) when and how the juror learned of that information; (4) the juror's own estimation of the relevance of that knowledge; (5) any express indications of partiality by a juror; (6) whether the atmosphere in the community or courtroom

However, the prosecution's most egregious misconduct was warning the jury

was sufficiently inflammatory; and (7) the steps taken by the trial court in neutralizing this information. Applying these factors to this case, the court found that the trial court's conclusion that Barton was impartial was supported by the record.

Gall next raised the issue of prosecutorial misconduct and argued that a host of prosecutorial statements and conduct violated his constitutional rights. To obtain habeas relief because of prosecutorial misconduct, a defendant must establish that the relevant misstatements were so egregious as to render the entire trial fundamentally unfair to a degree tantamount to a due process violation.@

The court first must determine if the comments were improper. If the comments were improper, the court must determine if they were sufficiently flagrant to warrant reversal by looking to: (1) the likelihood that the remarks would mislead the jury or prejudice the accused; (2) whether the remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally presented to the jury; and (4) whether the evidence against the defendant was substantial.

The court found that the Commonwealth's closing argument was laced with improper and prejudicial statements. First, the prosecutor injected his own personal beliefs and opinions as to Gall's guilt. Furthermore, the attorney misrepresented crucial evidence pertaining to Gall's EED and insanity. The court found that misrepresenting facts and evidence can amount to substantial error because doing so may profoundly impress a jury and may have a significant impact on the jury's deliberations.@

The court found that the prosecutor was irresponsible when summarizing Dr. Nolker's testimony. Moreover, the prosecutor's misrepresentations compromised a part of a broader strategy of improperly attacking Gall's insanity defense by criticizing the very use of the defense itself, rather than addressing its merits.

that Gall would go free if he was found not guilty by reason of insanity. The court held

that these comments detracted from the fair consideration of Gall's insanity defense by introducing the prospect that such a determination would inevitably lead to Gall's release. Moreover, the comments violated the cardinal rule that a prosecutor cannot make statements calculated to incite the passion and prejudice of the jurors.

The prosecutor's tactics were improper and flagrant. Moreover, the statements mislead the jury, prejudiced Gall's insanity defense, were not accidental or isolated, and permeated the trial. Therefore, the misconduct was sufficiently egregious to render the entire trial fundamentally unfair.

Gall next argued that he was denied his right to confront his accuser when Chutkow's testimony was presented to the jury by video-tape without a showing that he was unavailable to testify. The court found that the use of Chutkow's video-taped deposition violated the Confrontation Clause. Unless there is a showing of constitutional unavailability, the defendant enjoys a right to confront and cross-examine crucial witnesses before the jury in open court. In this case, the prosecution provided no reason for Chutkow's absence. Moreover, the violation prejudiced Gall because it worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.®

At his deposition given during the habeas process, Chutkow testified that he believed that the video-taped testimony that he gave only addressed issues involving competency. However, the Commonwealth used Chutkow's deposition at trial to establish both Gall's competence and sanity. The 6th Circuit found that had Dr. Chutkow been in court and his role clarified, Gall's defense counsel would have had a greater opportunity to challenge the only evidence that the Commonwealth adduced regarding Gall's sanity. Thus, the court held that the Confrontation Clause violation bore a dramatic impact on the outcome of the trial, rendering actual prejudice to Gall's defense.®

The Commonwealth argued that Gall procedurally defaulted this claim by failing to raise it in the state court. The 6th Circuit agreed that the claim was procedurally

defaulted. However, a habeas petitioner can overcome a procedural default when he can: (1) demonstrate cause for the procedural default and actual prejudice resulting from the alleged constitutional error; or (2) show that the failure to consider the claim would result in a fundamental miscarriage of justice.

The 6th Circuit concluded that Gall could not demonstrate cause for the procedural default. However, the court did find that the default should be excused because the failure to recognize the claim would result in a fundamental miscarriage of justice. The court acknowledged that this method of excusing a procedural default raises a high burden for the habeas petitioner to meet, occurring only in the extraordinary case.® To fulfill this requirement, a habeas petitioner must show that it is more likely than not that no reasonable juror would have convicted the defendant absent the claimed error or in light of new evidence.®

The 6th Circuit concluded that the Confrontation Clause violation likely stood in the way of an acquittal for reason of Gall's insanity. Given Dr. Chutkow's statements at his habeas deposition, it was clear that the Commonwealth had no evidence to rebut Gall's showing of insanity. Moreover, it was clear that the Confrontation Clause violation sparked Chutkow's misperceptions about his role at the trial. This allowed Chutkow's testimony, that Gall was competent to stand trial, to be misleadingly used to support the Commonwealth's argument that Gall was sane at the time of the crime.

Next, Gall argued that the penalty phase instructions given violated his rights under the 8th and 14th Amendments. Gall challenged three aspects to the sentencing instructions: (1) the mitigating circumstances you **may** consider are as follows . . . ;® (2) your findings and verdict must be unanimous and must be signed by the foreman;® (3) Gall alleged that this communicated to the jurors that any mitigating factors had to be found unanimously; and (3) jurors needed to find that a mitigating factor existed by a preponderance of the evidence.

The basic test of the constitutionality of death penalty sentences is whether the statutes and jury instructions have permitted the jury to consider all relevant mitigating evidence. The court found that there was no constitutional prohibition on states requiring that mitigating circumstances be proven by a preponderance of the evidence. Moreover, the challenged instruction that used the word *Amay*® was only one aspect of a longer set of instructions. The court was describing the circumstances the jury could consider as mitigation. Using the word *Amay*® comported with *Lockett v. Ohio*, 438 U.S. 586 (1978) by informing the jury that it was not limited to the four specific examples of mitigating factors that the court enumerated. Instead, the jury could consider other circumstances. Therefore, the first and third challenges to the instructions were rejected.

However, the court found that Gall's challenge to the unanimity instruction raised a due process challenge cognizable on habeas review. The court found that the instructions and verdict form that were submitted to the jury were constitutionally defective. The verdict form posed five questions to the jury: (1) whether Gall had committed the murder while committing the rape; (2) whether the offense was committed under the influence of extreme or emotional disturbance; (3) whether the offense was committed at the time that Gall was insane; (4) whether Gall's age was a mitigating factor; and (5) whether there were any other mitigating factors present.

The first four questions instructed the jury to answer yes or no. However, the 5th question asked the jurors to list any mitigating factors that they found present. Following the judge's instructions that *A*your findings and verdict must be unanimous and must be signed by the foreman,® the court concluded that a reasonable juror would likely assume that unanimity was required before indicating *A*yes® to one of the enumerated mitigating circumstances. Otherwise, *Ano*® was appropriate. Moreover, the trial judge did nothing to dispel this inference.

Given the judge's instruction that all findings must be unanimous, a reasonable Fed. R. Evid. 606 governs the

juror would have assumed that the fifth question on the form required unanimity. If a single juror believed that Gall had not shown any of the three mitigating circumstances listed on the jury form, even if the remainder of the jury firmly believed that all three circumstances existed, a likely interpretation of the unanimity instruction would have required the jury to answer *Ano*® to the presence of each mitigating circumstance.

Gall's next argument was that the trial court erred by dismissing a venireman, Correll, who was uncertain about his views on the death penalty. The Supreme Court has consistently held that the 6th Amendment right to an impartial jury is infringed when, through the procedure used to obtain a jury, the trial judge permits a jury to be selected that is uncommonly willing to condemn a man to die.

A juror is properly excluded for cause when the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his oath. The court found that Correll's views on the death penalty. Moreover, Correll informed counsel that he would *A*possibly or very possibly® feel that the death penalty was appropriate in certain factual scenarios. However, Correll stated that he could follow the law as instructed. Correll's answers to questions showed that he was not *A*so irrevocably opposed to capital punishment as to frustrate the state's legitimate efforts to administer its death penalty scheme.® The 6th Circuit held that this type of error was not subject to harmless error analysis.

The final argument advanced by Gall was that the post-conviction testimony of juror Palmer demonstrated that Gall's death sentence was unconstitutional. In a post-conviction questionnaire and again at a deposition conducted as part of Gall's habeas petition, Palmer indicated that he was aware that Gall was on parole when he committed the crime. Moreover, Palmer indicated that *A*the question of parole -- the fact that Gall committed the crime while on parole, and the potential for parole from a life sentence -- played an important role in the jury's decision to render a death sentence.®

admissibility of evidence pertaining to jury

deliberations. A court is generally not permitted to inquire as to internal influences on jury deliberations. Examples of internal influences include the behavior of jurors during deliberations; the jurors' ability to hear and comprehend trial testimony; physical or mental incompetence of a juror; and the misapprehension of jury instructions.

However, the court generally is permitted to inquire about outside influences which would include a juror in a criminal trial who had previously applied for a job in the district attorney's office; a bribe attempt on a juror; and the effect of newspaper articles and media attention on deliberations. The court found that Gall's parole status was improper external information. Moreover, the court held that a reasonable juror would have likely considered Gall's parole status in arriving at a sentence.

Thus, due process was violated because Gall's death sentence was imposed, at least in part, on the basis of information that he had no opportunity to deny or explain. Under existing law at the time, Kentucky did not permit jurors to consider parole as an aspect of their sentencing decision. Moreover, counsel was not allowed to discuss parole eligibility in their arguments before the jury. Thus, the jury's knowledge of Gall's parole status at the time of the killing and the trial court's failure to respond appropriately to its question regarding parole inflicted substantial and injurious influence in determining the jury's verdict. As a result of the constitutional violations in this case, Gall's habeas petition was granted.

The court held that Gall could not be retried for murder and that he had already served a sentence in excess of the statutory maximum for the lesser-included offense of manslaughter. The court parsed the record and concluded that there was overwhelming evidence that Gall was insane at the time that he committed the rape and murder. Moreover, the court found that Gall's psychotic condition was permanent and that he would be an extremely dangerous person if he would be released into society.

Four months later, a second penalty phase hearing commenced before a different

Based on this overwhelming showing of Gall's severe mental illness and his high potential for future dangerousness, the court conditioned the grant of Gall's habeas petition on the Commonwealth granting him an involuntary commitment proceeding. The court added that we can only hope that the Commonwealth will note the overwhelming evidence that this man is severely mentally ill and highly dangerous and commit him indefinitely on that basis.®

Skaggs v. Parker, 230 F.3d 876 (6th Cir. 2000).

Herman and Mae Matthews were killed in their home in Kentucky and Skaggs was the prime suspect. After being approached by law enforcement, Skaggs twice confessed to the killings and led police to the murder weapon as well as Mae's purse. Prior to the trial, Skaggs informed the court that he intended to introduce evidence of his mental illness. Consequently, the court appointed two psychiatrists, Drs. Green and Kernohan, to evaluate Skaggs' mental condition. However, Dr. Kernohan refused to evaluate Skaggs. Consequently, the court appointed Dr. Ravani to conduct the evaluation. Skaggs objected to Dr. Ravani's appointment and instead requested the appointment of an independent psychiatrist for the defense.

Accordingly, the court approved the payment of \$1,000 for the appointment of Dr. Bresler who was solicited by Skaggs' attorneys. Dr. Bresler claimed to be a licensed clinical and forensic psychologist and he was hired to evaluate Skaggs. At trial, Bresler testified that Skaggs was insane. The 6th Circuit observed that Dr. Bresler's testimony was rambling, confusing, and at times, incoherent to the point of being comical.® The Commonwealth's expert testified that Skaggs was sane.

The jury convicted Skaggs of all counts and the defense did not call Bresler as a witness in the penalty phase of the trial. This decision was based on Bresler's poor performance at the guilt phase. Because the jury could not agree on the appropriate penalty to be imposed, a mistrial was declared. jury. Much of the testimony at this hearing was the same as given at the trial. However,

defense counsel was unable to locate any expert to testify about the psychotic nature of Skaggs=condition so counsel recalled Bresler.

At this hearing, Bresler testified consistently with his first trial testimony. The Commonwealth called an expert in rebuttal who opined that Skaggs was sane and the jury sentenced Skaggs to death.

After the verdict, Skaggs discovered that Bresler had falsified his credentials and had neither studied nor trained to be a psychologist. Instead, Bresler=s only formal college education was two years as an English major. Moreover, Skaggs offered the testimony of two psychiatric experts who both concluded that Skaggs was mentally retarded and that Bresler=s testimony was Aso far below the standard of care as to totally misrepresent Skaggs to the jury.@

Skaggs was unsuccessful on direct appeal and at the district court in his ' 2254 petition. On appeal to the 6th Circuit, the only issue considered by the court was whether Skaggs= trial counsel were ineffective. In order to prevail on a claim of ineffective representation, the habeas petitioner must establish that trial counsels=performance fell below an objective standard of reasonableness and that the resulting prejudice deprived him of a fair trial.

The 6th Circuit found that Skaggs=trial counsel were not ineffective during the guilt phase of the case. ACounsel located Bresler and retained his services much the same way that many trial attorneys obtain an expert: through recommendations from colleagues and general familiarity with the legal community. Given the magnitude of what was at stake, and the centrality of Skaggs=mental state to a legitimate defense, counsel should have taken more time and given more thought to their expert witness.@ Nonetheless, considering counsels=familiarity with Bresler as an expert and their usage of his services in the past, counsels= failure to conduct a full blown investigation into Bresler=s academic

The 6th Circuit has interpreted *Ake v. Oklahoma*, 470 U.S. 68 (1985) to recognize that in addition to the right to a psychiatric expert at the guilt phase, an indigent defendant is constitutionally entitled to the psychiatric

history or to verify his credentials did not fall below the objective standard of reasonableness under *Strickland*.

However, the court found that counsels=decision to use Bresler in the penalty phase of the trial presented a different question. The failure to present mitigating evidence when it was available can never be labeled to be a strategic decision. Instead, it is an Abdication of advocacy.@

Despite acknowledging that Bresler was not a competent witness and made a mockery of the first trial, defense counsel nonetheless called him to testify at the second penalty phase, primarily because counsel waited until the eleventh hour to prepare for the penalty phase and to line up a psychiatric expert to testify on Skaggs=behalf. Counsels=decision to call Bresler at the retrial of the penalty phase, despite their belief that Bresler=s testimony could realistically be more harmful than helpful, simply because counsel believed it would not be worth their time to request additional money from the court, cannot be deemed to have been a reasonable exercise of professional judgment.

Because counsel failed to introduce other competent mitigating evidence, the court found that they failed to put on any mitigating evidence at all. The court also held that Skaggs was prejudiced by his attorneys=decision to use Bresler as a witness. When a defendant challenges a death sentence, Athe question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently re-weighs the evidence -- would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death.@ The petitioner need not prove by a preponderance of the evidence that the result would have been different. Instead, the petitioner must show that there is a reasonable probability that the result would have been different.

or psychological assistance during the sentencing phase if the: (1) defendant=s sanity is a significant issue during the trial; or (2) defendant is on trial for his life and the state first presents psychiatric evidence of future

dangerousness.

Counsel's failure to present an even marginally competent expert on crucial evidence prejudiced Skaggs at the penalty phase of the trial. There was a reasonable probability that the jury would have weighed the mitigating and aggravating factors differently had counsel performed adequately. ABresler misrepresented himself as a licensed clinical and forensic psychologist; his presentation to the jury was fraudulent and resulted in the jury making a determination regarding the appropriate sentence for Skaggs without the aid of critical mitigating information.

Given the fact that counsel's performance resulted in a jury imposing a death sentence based on inaccurate >psychobabble= and the considerable mitigating evidence that could have been presented by an actual expert had counsel functioned properly, counsel's deficient performance rendered the result of the trial unreliable and the proceeding fundamentally unfair.@ Therefore, the 6th Circuit reversed the district court's denial of Skaggs= habeas petition based on ineffective assistance of counsel received by Skaggs at the penalty phase of his trial.

United States v. Lewis, 231 F.3d 238 (6th Cir. 2000).

In December 1996, an informant began providing information to the Cleveland Police Department that Lewis and his brother, Julian, stored and sold narcotics out of their home located at 10105 Westchester Avenue in Cleveland. The informant told the officers that Julian would make a large delivery of narcotics between 3:00 and 4:00 P.M. on December 21, 1996. The informant also stated that Julian would be driving a black Jeep to this transaction. Surveillance was established and Julian was observed driving the black Jeep from his house at about 3:35 P.M. The Jeep went one block down the street and stopped across the street from a black Chevrolet. Antonio Clark exited the Chevrolet and entered the Jeep. The officer saw Clark and Julian exchange something and concluded that a drug deal was in progress.

Barnes was convicted of assault on the

As the officers pulled up to the Jeep, Julian tossed several rocks of crack into the backseat while Clark shoved something into his pants. The officers approached the Jeep, saw the crack, and arrested both Clark and Julian.

The officers then returned to Clark's house to Asecure@ the premises. The officers knocked on the door and a child answered. The child told the officers that his mom was shopping and the officers asked if they could enter. The child allowed the officers inside at which time they saw Lewis running upstairs. The officers feared that Lewis was either attempting to get a weapon or destroy evidence so they pursued him into a bedroom where they found a large quantity of crack, a firearm, and a scale. The district court denied Lewis= motion to suppress. Lewis was convicted, sentenced to serve life in prison, and appealed the denial of his motion to suppress physical evidence to the 6th Circuit.

A warrantless entry to prevent the destruction of evidence is justified if the government demonstrates a reasonable belief that third parties: (1) are inside the dwelling; and (2) may soon become aware that the police are on their trail, so that the destruction of evidence would be in order.

The 6th Circuit found that the police officers had no reason to believe that third parties were inside the house at the time of the transaction. The informant indicated that there would be a drug transaction outside of the house. The officers observed Julian leave the house and did not see either Julian or anyone else enter the house. The officers who entered the house were aware that Julian had been arrested but they had no knowledge of Lewis= whereabouts and no reason to assume that he was inside the house. The uncorroborated information that Lewis and Julian were partners in a drug business operating out of the house, did not support the reasonable belief that anyone was home at the time of the transaction. Therefore, the 6th Circuit reversed the denial of Lewis= motion to suppress.

Barnes v. Elo, 231 F.3d 1025 (6th Cir. 2000).
eyewitness testimony of a 12 year old

complainant who testified that after going to bed, she was awakened by an unidentified man kissing the side of her face. After a struggle, the suspect ran down the stairs and out of the house. The complainant's mother also testified that she saw a man running down the stairs and out the front door. The complainant and her mother were unable to catch the suspect. Police officers were summoned to the scene and the initial report given by the complainant neglected to mention that the suspect had a limp. On a later occasion, the complainant told the officer that her assailant had a limp.

At Barnes' bench trial, the parties stipulated that he suffered from post-polio syndrome and wore a brace on his leg. Barnes' counsel filed a notice of alibi but presented no alibi testimony.

After sentencing, Barnes filed a motion to remand for an evidentiary hearing based on ineffective assistance of trial counsel. The ineffectiveness was based on his counsel's failure to call medical witnesses to testify as to Barnes' inability to run as well as counsel's failure to call alibi witnesses. Barnes' appellate counsel filed an affidavit prepared by Dr. Waring which stated that he had not been contacted by Barnes' trial counsel, that he would have been available to testify, and that he would have testified that Barnes was physically unable to run down the stairs and out the door as the complainant testified.

Barnes was unsuccessful in the state appellate process and the district court denied Barnes' 2254 petition. The 6th Circuit held that a federal court shall not grant a petition for a writ of habeas corpus unless the state court's adjudication of the claim resulted in a decision that was contrary to or involved an unreasonable application of clearly established Federal law as determined by the Supreme Court. An unreasonable application occurs when the state court identifies the correct legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. The inquiry is whether the state court's application of clearly established federal law was objectively unreasonable.

The standards for determining ineffective assistance of counsel are clearly established federal law as found in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* requires a defendant to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense such that the defendant was denied a fair trial. Barnes argued that he was denied the effective assistance of counsel by his trial counsel's failure to investigate or call a medical witness to establish Barnes' inability to run in a manner that the complainant testified. The 6th Circuit found that it was unclear from the record whether and to what extent trial counsel investigated Barnes' medical condition and why he failed to contact Dr. Waring.

Given Dr. Waring's ability to testify that Barnes was incapable of running as the complainant described, the court concluded that he certainly would have been an essential defense witness. Because Barnes never received an evidentiary hearing and the record before the court failed to clarify facts that were essential to the determination of whether the adjudication of Barnes' claim by the Michigan State Courts resulted in a decision that was contrary to or involved in unreasonable application of clearly established Federal law,⁶ the case was remanded to the district court for a hearing on the effectiveness of Barnes' trial counsel.

United States v. Page, 232 F.3d 536 (6th Cir. 2000).

Page, Powers, Linton, and Hill were all indicted for participating in a conspiracy to distribute crack in Tennessee. Linton was a citizen of Barbados and he gave law-enforcement officers inculpatory statements after he was arrested. Before his statements, Linton was informed of his *Miranda* rights but he was not informed of his right to contact the Barbados' consulate as is provided in Article 36 of the Vienna Convention. Consequently, Linton filed a motion to suppress his statements as well as a motion to dismiss the indictment on the ground that the government failed to comply with the provisions of the Vienna Convention.

The district court denied the motion after finding that a treaty confers no private right of enforcement upon individuals. Moreover, the court also found that a violation of a treaty does not rise to a constitutional violation. The 6th Circuit affirmed and concluded that as a general rule, international treaties do not create rights that are privately enforceable in federal courts. The court found that there was no right in a criminal prosecution to have evidence excluded or an indictment dismissed due to a violation of the Vienna Convention.

Powers challenged his sentence arguing that the district court erred by failing to exclude from its calculation of drug quantity the amount of crack cocaine that he possessed for personal consumption. The 6th Circuit found that the drugs obtained by Powers for his personal use were properly included as relevant conduct because Powers knew that they were distributed by the conspiracy.

In the final issue, the four defendants raised a challenge to their sentences in light of *Apprendi v. New Jersey*, 120 S. Ct. 2348

However, the defendants failed to raise this issue in the district court. Therefore, the 6th Circuit subjected this argument to a plain error standard of review. The court concluded that it could not correct an error pursuant to Fed. R. Crim. P. 52(b) unless there was an error that was plain or clear under current law that affected substantial rights. Current law for the purposes of plain error review is the law that existed at the time of review.

The court found that the error affected substantial rights and was prejudicial because it affected the outcome of the district court proceedings. Moreover, there was no question that imposing a sentence of imprisonment that exceeded that authorized by a jury's verdict affects a defendant's substantial rights.

Finally, a sentencing error seriously affects the fairness, integrity, or public reputation of judicial proceedings when a court's error resulted in the imposition of a sentence that was not authorized by law.

Nonetheless, the government argued that the sentencing errors with respect to Linton, Hill, and Powers were not prejudicial.

(2000). In count one of the indictment, the defendants were charged with conspiracy to distribute and possession with intent to distribute crack. There was no mention of quantity in the indictment and the jury made no findings regarding quantity. Instead, the indictment cited ' 841(b)(1)(C). At sentencing, the district judge made findings by a preponderance of the evidence about the quantity of drugs for which each defendant was accountable. Based on this drug quantity determination, each defendant was sentenced to a term of imprisonment that exceeded the 20 year maximum set forth in ' 841(b)(1)(C).

The 6th Circuit found that in its verdict, the jury merely found that the defendants conspired to distribute and possess with intent to distribute an undetermined amount of crack. Consequently the court held that the defendants could not be subjected to the higher penalties under ' 841(b)(1)(A) or (B). Instead, the court found that the maximum sentence that could be imposed on the conspiracy offense would be 20 years of imprisonment.

This argument was based on the fact that these three defendants were convicted not only of conspiracy count but also one or more substantive counts of distribution and/or possession with intent to distribute crack. Each of the substantive offenses carried a statutory maximum of 20 years pursuant to ' 841(b)(1)(C).

The government argued that there would be no change in the sentences imposed on Linton, Hill, or Powers if their cases were remanded for resentencing. Rather than running the sentences concurrently, the guidelines would require the sentence imposed on one or more of the substantive counts to run consecutively to the sentence on the conspiracy count to the extent necessary to produce a combined sentence equal to the total punishment (i.e. 30 years). USSG ' 5G1.2(d).

The 6th Circuit agreed that Linton, Hill, and Powers were not prejudiced and the fairness of the proceedings was not affected by the error since, absent the error, their sentences would have been the same as those

that were imposed. However, Page was convicted of only the conspiracy count and was sentenced to serve 30 years of imprisonment. This sentence was ten years more than the prescribed statutory maximum. Accordingly, the court held that Page's substantial rights were affected and the fairness of the proceedings was undermined since the error clearly affected the outcome of the case by substantially increasing his sentence.

Wolfe v. Brigano, 232 F.3d 499 (6th Cir. 2000).

Under Ohio law, a defendant in a non-capital felony trial can use four peremptory challenges as well as an unlimited number of causal challenges during jury selection. During *voir dire*, Wolfe challenged six jurors for cause. However, the trial court sustained only one of the causal challenges. Wolfe then proceeded to remove one of the other five challenged potential jurors with a peremptory

The 6th and 14th Amendments to the Constitution guarantee a criminal defendant the right to an impartial jury. However, any allegation of juror bias must be preserved at the trial or it is waived. The Ohio appellate courts concluded that Wolfe failed to preserve his right to challenge the presence of the four biased jurors because he failed to remove them with peremptory challenges. However, in *United States v. Martinez-Salazar*, 120 S. Ct. 774 (2000), the Court stated that when a defendant objects to a trial court's denial of his causal challenges, the defendant may choose to either remove the challenged juror peremptorily and forego a later 6th Amendment challenge or allow the juror to sit and preserve the 6th Amendment claim for appeal. Therefore, the 6th Circuit concluded that Wolfe properly preserved his 6th Amendment claim.

Moreover, the 6th Circuit also found that the Ohio appellate court's erred by concluding that the trial judge did not abuse his discretion in refusing to excuse the four jurors that Wolfe challenged for cause. In the absence of an affirmative and believable statement that the four jurors could set aside their opinions and decide the case on the evidence, the failure to dismiss them was

challenge but he exhausted his remaining peremptory challenges on three potential jurors that he had not challenged for cause.

The remaining four jurors that Wolfe challenged for cause were seated as jurors even though they all expressed doubts as to whether they could be fair and impartial. Two of the jurors stated that they had close and long-standing relationships with the victim's parents. A third juror stated that she was doubtful that she could return a verdict based on the evidence presented in light of all of the information that she learned about the case in the news media. Finally, the fourth juror stated that he doubted that he would require the prosecution to prove its case beyond a reasonable doubt. Predictably, Wolfe was convicted and his conviction was affirmed in the state court system. However, the district court granted Wolfe habeas relief and the Warden appealed.

unreasonable and the failure to remove the biased jurors tainted the entire trial.

United States v. Roberts, 233 F.3d 426 (6th Cir. 2000).

Roberts was indicted in state court for raping and kidnapping two juveniles. While in state custody, Roberts escaped and a warrant issued for his arrest. Thirteen months later, a federal grand jury indicted Roberts for violating federal law based on the same conduct for which he was indicted in state court. However, Roberts was still an escapee on the state offense when he was indicted by the federal grand jury. Eventually, Roberts was arrested and pled guilty to the federal charges that were filed when he was an escapee. The district court looked at the spectrum of Roberts' conduct and imposed an enhancement for obstruction of justice (USSG ' 3C1.1) and denied an acceptance of responsibility reduction (USSG ' 3E1.1) because of its inconsistency with the obstruction of justice enhancement and Roberts appealed.

One type of conduct that the guidelines punish as obstructive is Aescaping . . . from custody before trial for sentencing@ if the escape occurred during the Acourse of the investigation, prosecution, or sentencing of

the instant offense of conviction.[@] The 6th Circuit found that even though Roberts' escape occurred from state custody before the federal investigation began, an obstruction of justice enhancement was appropriate.

The court held that obstructive conduct occurring during the state investigation or prosecution and preceding federal involvement triggers the enhancement even if the federal charge is not identical to the state charge, so long as the underlying behavior is connected to both offenses. The determinative factor is that both the state and federal charges and the obstructive activity must be related to the same underlying activity.

Roberts next challenged the district court's denial of an acceptance of responsibility reduction. USSG ' 3E1.1, n.4 states that an acceptance of responsibility decrease is generally not appropriate if the defendant's conduct has resulted in an obstruction of justice enhancement. However, note four also states that there may be extraordinary cases in which adjustments for

On appeal, Cofield argued that the district court had no jurisdiction to revoke his supervised release because it improperly imposed a term of supervision at his original sentencing. Cofield relied on the following rule to support his argument: If there is a discrepancy between the oral pronouncement of a criminal sentence and the written judgment, the oral sentence generally controls.[@] Applying this logic to his case, Cofield argued that because the district court's oral pronouncement conflicted with the written judgment as to whether Cofield was obligated to complete a term of supervised release, the oral pronouncement controlled.

The 6th Circuit rejected Cofield's argument because a term of supervised release was mandatory when a sentence of imprisonment of more than one year was imposed. USSG ' 5D1.1. The court found that to the extent that the district court erred in omitting to impose a term of supervised release, the error was harmless and was corrected the same day when the written judgment was filed. Moreover, Cofield waived his argument by not objecting to the

both obstruction of justice and acceptance of responsibility would apply. However, district courts must employ an exacting standard to determine whether a defendant has accepted responsibility after having obstructed justice.[@]

Because the sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility, the 6th Circuit accorded the district court's decision great deference and held that this was not an extraordinary case in which the defendant could qualify for an obstruction of justice increase and an acceptance of responsibility decrease.

United States v. Cofield, 233 F.3d 405 (6th Cir. 2000).

Cofield was convicted of wire fraud in 1991 and at sentencing, the district court orally pronounced a sentence of five years of imprisonment. However, in the written judgment filed later that day, Cofield was ordered to serve five years in prison and a three year term of supervised release. While on supervised release, Cofield violated his conditions of supervision and was sentenced to serve two additional years in prison.

When it was imposed or challenging the sentence either on direct appeal or in a collateral proceeding.

Cofield also argued that his probation officer had no authority to file a petition to revoke his supervised release. In making this argument, Cofield relied on *United States v. Jones*, 957 F. Supp. 1088 (E.D. Ark. 1997) which held that only the U.S. Attorney, not a probation officer, may petition the district court for the revocation of a defendant's supervised release. The 6th Circuit also rejected this argument and held that the filing of revocation petitions did not exceed the scope of the probation officer's statutory duty to report the conduct of a person on supervised release to the sentencing court. The district court, not the probation officer or the United States attorney, ultimately determines whether revocation proceedings will actually be initiated. By filing a petition to revoke supervised release, the probation officer merely acts as an agent for the district court and gives the court the information necessary to make that determination.

United States v. Moerman, 233 F.3d

379 (6th Cir. 2000).

Moerman entered a bank with a rifle and approached a teller who was helping a customer. Moerman used the barrel of the rifle to push the customer aside and he informed the customer that the matter did not concern him. Moerman then pointed the rifle at the teller and demanded "Give me your money." The teller complied with Moerman's demand and approximately two weeks later, Moerman committed another armed bank robbery in the same fashion. Moerman was convicted of these two armed bank robberies and the district court enhanced his offense level six levels for "otherwise using" a firearm pursuant to USSC § 2B3.1(b)(2)(B). Moerman maintained that he only "brandished" the firearm and his offense level should have only been increased by five levels under § 2B3.1(b)(2)(C).

The guidelines provide a definition for "brandishing" and "otherwise using" a firearm. Brandish means that the weapon was "pointed or waved about, or displayed in a threatening manner." In contrast, "otherwise use" means that the conduct did not amount to the discharge of the firearm but was more than brandishing, displaying, or possessing a firearm. The 6th Circuit concluded that the guidelines "attempt to define these two

Perez testified that he rode in the car with Gonzales and Tuggle at which time Gonzales stopped the car and began arguing with Tuggle. Perez then observed Gonzales strike Tuggle with a tire iron and return to the car. While driving away from the scene, Gonzales warned Perez not to tell anyone about what he saw or Perez would be killed. Eventually, Perez informed the Detroit Police Department about what he saw and led them to the location where Tuggle's body was found.

Gonzales was convicted of second degree murder and his appeals were unsuccessful. Moreover, the district court denied Gonzales' § 2254 petition and he appealed to the 6th Circuit. A prisoner seeking habeas relief in federal court must have presented the claim upon which he seeks relief to the state appellate courts.

A determination of whether a

concepts was "not particularly useful."

However, the court found that the concept of brandishing includes both pointing the firearm and pointing it in a threatening manner which was exactly what was done in this case. Moerman's use of the barrel of the firearm to move the customer aside was not accompanied by a threatening statement. Instead, Moerman made a non-threatening statement to the effect that the customer should move out of the way because the matter did not concern him. Thus, Moerman's action and/or statement did not directly threaten the customer with the use of a firearm if he did not comply with Moerman's demands. Consequently, the 6th Circuit found that the district court erred by enhancing Moerman's base offense level by six levels for "otherwise using" a firearm.

Gonzales v. Elo, 233 F.3d 348 (6th Cir. 2000).

Jonathon Paulk, lived across the street from Chris Tuggle in Detroit. On September 6, 1983 at approximately 11:00 P.M., Paulk observed Tuggle removing speakers from Tuggle's car while Gonzales was standing next to the car. Tuggle moved the speakers into his house and returned to his car at which time Tuggle, Gonzales, and Perez got into a vehicle and drove away.

petitioner procedurally defaulted his claim brought before the federal court requires an analysis under a four-part test: (1) the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule; (2) the court must decide whether the state courts actually enforced the state procedural sanction; (3) the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground upon which the state can rely to foreclose review of the federal constitutional claim. . . this question generally will involve an examination of the legitimate state interest behind the procedural rule in light of the federal interest in considering federal claims; and (4) the petitioner must demonstrate that there was cause for him not to follow the procedural rule and that he was actually prejudiced by the alleged constitutional error."

After applying this test to the applicable Michigan procedural law, the 6th Circuit found that Gonzales was not procedurally barred from pursuing an ineffective assistance of counsel claim that was raised in his ' 2254 petition. Therefore, the 6th Circuit proceeded to consider the merits of Gonzales=ineffectiveness claim.

Gonzales claimed that he was denied the effective assistance of counsel when his counsel failed to specifically inform him that the right to testify was a right personal to him and that Gonzales could assert that right despite his attorney=s advice to the contrary. The 6th Circuit rejected Gonzales=ineffectiveness claim and held that Awhen a tactical decision is made not to have a defendant testify, the defendant=s assent is presumed.@

At the evidentiary hearing conducted in the habeas proceedings, Gonzales=attorney testified that he made a tactical decision to advise Gonzales not to testify because Gonzales was not credible. Gonzales testified that his attorney told him not to testify because when compared to Perez=s appearance, Gonzales Alooked too mean.@ Thus, both parties agreed that defense counsel=s decision to advise Gonzales not to testify was a tactical decision. Moreover, the

Napier was indicted by the federal grand jury for possession of a firearm and ammunition by a person subject to a domestic violence order in violation of 18 U.S.C. ' 922(g)(8). Napier moved to dismiss the indictment by arguing that: ' 922(g)(8) violated the Due Process and Commerce Clauses; the domestic violence orders did not qualify as predicate offenses; and the domestic violence orders did not fulfill the substantive requirements of ' 922(g)(8)(i) and (ii). The district court denied Napier=s motion and he entered a conditional guilty plea.

The 6th Circuit found that ' 922(g)(8) did not violate the Due Process Clause even if Napier had not received a copy of the domestic violence orders. The court held that there was no basis for requiring actual notice of gun prohibition. Instead, Napier was notified of the proceedings that led up to the issuance of the domestic violence orders and

record was devoid of any indication that Gonzales disagreed with his counsel=s strategy.

Instead, Gonzales chose to raise this issue six years after he was convicted. Therefore, the 6th Circuit found that Gonzales= counsel=s advice did not fall below a standard of reasonableness. Moreover, even if counsel=s advice was unreasonable, Gonzales failed to demonstrate that he was prejudiced by counsel=s advice because the State=s witnesses corroborated the government=s version of the events.

United States v. Napier, 233 F.3d 394 (6th Cir. 2000).

Napier=s estranged wife called the police to report an assault by Napier. Napier=s contact with his wife was in direct violation of two domestic violence restraining orders to which he was subject. Both orders were given to Napier after a hearing was conducted and the orders stated that Apursuant to 18 U.S.C. 922(g), it is a federal violation to purchase, receive, or possess a firearm while subject to this order.@ When Napier was arrested, police found him in possession of a firearm and ammunition. Even though Napier was subject to the restraining orders at the time he was in possession of the firearm and ammunition, he had not been convicted of domestic violence. he attended those hearings. Whether or not Napier received a copy of the domestic violence orders was of no consequence. Napier=s status alone, as one subject to a domestic violence order, was sufficient to preclude him from claiming a lack of fair warning with respect to the requirements of ' 922(g)(8).

Napier also argued that ' 922(g)(8) was an unconstitutional exercise of Congress=power under the Commerce Clause because it was an attempt by Congress to regulate domestic abuse which was strictly a matter of state concern. The 6th Circuit found that there are three broad categories of activity that Congress may regulate under its commerce power: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) those activities that have a substantial

relation to interstate commerce.

The court held that ' 922(g)(8) was a constitutional exercise of Congress= authority under the Commerce Clause because ' 922(g) only applies to firearms and ammunition that are shipped or transported in interstate or foreign commerce or possessed or affecting commerce. With this jurisdictional element, ' 922(g) Aboth explicitly relates to commerce and ensures only those activities affecting interstate commerce fall within its scope.®

Napier argued that because he owned a firearm before he became subject to a domestic violence order, any commerce involving a firearm had long since ceased and the link between his conduct and the affect on interstate commerce was too attenuated to come within Congress= power under the Commerce Clause. In sum, Napier argued that Congress did not have the authority to regulate persons who already owned guns before they became subject to the domestic violence order. The 6th Circuit rejected this argument and held that a firearm that has been transported at any time in interstate commerce has a sufficient affect on commerce to allow Congress to regulate the possession of that firearm pursuant to its Commerce Clause powers.

Finally, Napier argued that ' 922(g)(8) violated his right to bear arms under the Second Amendment to the United States Constitution as well as the comparable provision in the Kentucky Constitution. The

During recorded contacts between Munoz and an informant, Munoz told the informant that he could deliver ten pounds of Acrystal® at \$15,000 per pound and that he would send Flores to deliver the drugs. Pursuant to the discussion, Flores delivered 804 grams of amphetamine to the informant who in turn made a down payment on the drugs. Munoz and the informant had additional conversations about narcotics activities in which Munoz agreed to sell cocaine to the informant. True to form, Flores delivered 125 grams of cocaine to the informant.

In subsequent conversations, Munoz badgered the informant about full payment for the original delivery of Acrystal.® According

court rejected this challenge and held that the Second Amendment guarantees a collective rather than an individual right. Since the ASecond Amendment right to keep and bear arms only applies to the right of the State to maintain a militia and not to the individual=s right to bear arms, there can be no claim to any express constitutional right of an individual to possess a firearm.®

Moreover, the court addressed Napier=s argument that was predicated on the comparable provision in the Kentucky Constitution which provides that: AAll men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: . . . Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.® KY. CONST. ' 1.

The 6th Circuit rejected Napier=s argument on state constitutional grounds by finding that the Kentucky constitutional provision was trumped by the Supremacy Clause of the United States Constitution which provides that federal law Ashall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.® Thus, Aany state law that conflicts with federal law is without effect.®

United States v. Munoz, 233 F.3d 410 (6th Cir. 2000).

to the undercover agent involved in the investigation, Acrystal® is slang for methamphetamine and \$15,000 per pound was the going rate for methamphetamine. Eventually, Munoz was arrested and he confessed that he worked as a migrant worker for Cisneros. Through this relationship with Cisneros, Munoz admitted that he became involved in the drug trade after Cisneros asked him to assist in selling Acrystal.® Prior to this, Munoz was never involved in the drug trade.

Munoz was charged with conspiracy to distribute both cocaine and methamphetamine. During the plea colloquy, Munoz pled guilty to conspiracy to distribute cocaine but he specifically informed the court that he was not admitting that he conspired to distribute

methamphetamine. The district court deferred determining the type of drug to be used in calculating the penalty for the conspiracy offense until the time of sentencing. At sentencing, the district court based Munoz's offense level on methamphetamine that he intended to deliver rather than the amphetamine that was actually delivered. This determination was based on the district court's conclusion that the type of drug was a sentencing factor that was to be decided by the court at sentencing.

The first issue addressed by the 6th Circuit was the propriety of Munoz's guilty plea. Although the indictment conjunctively charged a conspiracy to distribute both methamphetamine and cocaine, Munoz only admitted his involvement in a conspiracy involving cocaine. The court found that the lack of a guilty plea to the methamphetamine did not invalidate the entire guilty plea. Instead, the court applied the general rule that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, the verdict stands if the evidence is sufficient with respect to any one of the charged acts.®

Title 21 U.S.C. § 841(b)(1)(C) prescribes a statutory sentence of 0 to 20 years imprisonment for Munoz's distribution of 126 grams of cocaine. In comparison, § 841(b)(1)(B) prescribes a statutory penalty of 5 to 40 years imprisonment if Munoz intended to distribute 804 grams of methamphetamine whereas § 841(b)(1)(C) prescribes a statutory penalty of 0 to 20 years for Munoz's actual distribution of 804 grams of amphetamine.

In this case, Munoz was sentenced to Flowal was traveling by plane from Los Angeles to Ft. Wayne, Indiana and during his odyssey, his flight stopped at the Greater Cincinnati Airport. A drug task force officer at the airport received information about a passenger traveling from Los Angeles to Ft. Wayne who matched the drug courier profile.® The agent located two pieces of luggage in the airline baggage area that were locked and belonged to Flowal. The agent shook the bags to determine if there was any movement and also pushed in the sides of the luggage. However, nothing suspicious was

serve 121 months imprisonment based on his intent to distribute methamphetamine as well as his actual distribution of cocaine. Therefore, Munoz's sentence did not exceed the statutory maximum contained in the count of the indictment to which he entered a valid guilty plea---his distribution of cocaine. Therefore, the court found that the district court's determination, by a preponderance of the evidence, that Munoz conspired to distribute methamphetamine, rather than amphetamine, did not increase the penalty beyond the prescribed statutory maximum for conspiracy to distribute cocaine. Therefore, the court found that *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000) had no application to this case.

Munoz next argued that the district court erred by sentencing him for the drug that he intended and conspired to deliver as opposed to the drug that he actually delivered. The 6th Circuit found that under USSG § 2D1.1, n.12, if Munoz could demonstrate that he was not reasonably capable of providing methamphetamine, his sentence should be based on the actual drug delivered. Thus, a defendant bears the burden of proving that he was not capable of producing the drug. In this case, because Munoz merely took the drugs provided by Cisneros, the 6th Circuit found that Munoz was not capable of delivering methamphetamine. Therefore, the case was remanded so that the district court could determine relevant conduct based on amphetamine, and not methamphetamine.

United States v. Flowal, 234 F.3d 932 (6th Cir. 2000).

discovered.

One officer remained with the luggage while two other officers returned to the terminal to locate Flowal. A drug dog sniffed the luggage but did not react. The officers caught up with Flowal as he was boarding the plane and the officers informed him that his luggage looked suspicious and asked for his consent to search the luggage. Flowal informed the officers that he did not have a key to unlock the luggage and that he would permit the search as long as the luggage was not damaged. A subsequent search of the

luggage yielded cocaine.

On the day of Flowal's arrest, a police officer determined the weight of the cocaine was 5.2 kilograms but this figure also included the weight of the packaging material. A DEA chemist later weighed the cocaine and its packaging material and determined that the gross weight was 5.354 kilograms and the weight of the raw cocaine was 5.008 kilograms. Two months later, another DEA chemist determined the weight of the raw cocaine was 4.997 kilograms.

Flowal was convicted of possession with intent to distribute cocaine and the district court found that the relevant drug quantity was 5.000 kilograms of cocaine. Because of Flowal's two prior felony drug convictions, the district court imposed a life sentence pursuant to 21 U.S.C. ' 841(b)(1)(A). On appeal, the 6th Circuit found that the district court arbitrarily based the weight of the cocaine on the amount that Flowal intended to possess and the case was remanded for resentencing. However, on remand, the district court found, by a preponderance of evidence, that the weight of the cocaine was 5.008 kilograms and imposed another life sentence. Flowal again appealed to the 6th Circuit.

On appeal, Flowal argued that *Bond v. United States*, 529 U.S. 334 (2000) forbade government agents from seizing his luggage after manipulating it in an exploratory manner. According to Flowal, because his luggage

Because of Flowal's two prior felony drug convictions, life imprisonment was mandatory if he possessed five or more kilograms of cocaine. However, if Flowal possessed less than five kilograms but more than 500 grams, his statutory sentencing range was between 10 years to life. Finally, if Flowal possessed less than 500 grams, he could be imprisoned for up to 30 years. The 6th Circuit concluded that because the amount of drugs at issue determined the appropriate statutory punishment, a jury should have determined the weight of drugs beyond a reasonable doubt.

The government argued that the penalty imposed did not exceed the Aprescribed statutory maximum.® Because of

was picked up from the conveyor belt, shaken, and the sides were pushed in a manner constituting an illegal search, the incriminating evidence found therein must be suppressed.

The 6th Circuit concluded that the search of Flowal's luggage was not unreasonable under *Bond*. The officers investigated Flowal's luggage because he matched the drug courier profile, not because they felt something suspicious in the luggage. Based on the drug courier profile, the officers also had a reasonable belief that the luggage could contain contraband before they touched it. Given that Flowal matched the drug courier profile and that he consented to the search of his luggage, the officers had a reasonable basis for the search independent of any physical manipulation of the bags.

Flowal also argued that *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000) required the submission of the drug weight question to the jury. The indictment specifically charged Flowal with possession of 5.2 kilograms of cocaine in violation of 21 U.S.C. ' 841(b)(1)(A). The ultimate fact of the district judge's finding in this case was the same as the effect of the judge's finding in *Apprendi*: The judge made a factual finding (drug quantity) that determined the appropriate length of the criminal sentence. Moreover, the finding as to the drug quantity determined the range of statutory penalties that would apply to Flowal.

Flowal's prior record, life imprisonment was the maximum penalty regardless of whether Flowal possessed either 4.997 kilograms or more than five kilograms of cocaine. However, even though the government's argument held some surface appeal, it did not address the fact that Flowal received a mandatory life sentence pursuant to ' 841(b)(1)(A) and that sentence was mandatory when the drug quantity for which he was accountable was more than five kilograms.

The court found that to violate ' 841(b)(1)(A), the government needed to convince a jury beyond a reasonable doubt that Flowal possessed more than five kilograms of cocaine, as alleged in the indictment. If the government only proved

that Flowal possessed 4.997 kilograms of cocaine, he would have been subject to the penalty provisions of ' 841(b)(1)(B) which prescribed a minimum of 10 years and a maximum of life in prison. Furthermore, if the government could only prove that Flowal possessed less than 500 grams of cocaine, he would face a maximum of 30 years in prison under ' 841(b)(1)(C).

Thus, the court held that these three statutory sections address three different crimes with three different elements (weight of drugs) and contain three substantially different penalty structures. Accordingly, the government was only entitled to the application of the punishment provisions of the crime whose elements it proved to the jury beyond a reasonable doubt.

The 6th Circuit found that because Flowal maintained on appeal that he possessed 4.997 kilograms of cocaine, if the parties agreed to the application of ' 841(b)(1)(B), the district court would not need to submit the issue of drug quantity to the jury. Instead the court could exercise its discretion and sentence Flowal under ' 841(b)(1)(B).

United States v. Sadolsky, 234 F.3d 938 (6th Cir. 2000).

Sadolsky was a regional carpet manager for Sears and over a period of six months, he accessed Sears' computers and fraudulently credited amounts for returned merchandise to his personal credit card that resulted in a loss of more than \$39,000. When Sadolsky's activities were discovered, he was interviewed by the Secret Service and admitted that he defrauded Sears to pay off \$30,000 worth of gambling debts.

Sadolsky pled guilty to computer fraud and in his plea agreement, a total offense level of 12 was stipulated. The presentence report contained information regarding Sadolsky's

The court also held that Sadolsky carried his burden of establishing the existence of his gambling compulsion. The three witnesses who testified were Sadolsky, his wife and Thomason, who was a member of Gamblers Anonymous (GA). Although Thomason was not tendered as an expert witness, he testified about his own gambling addiction as well as his 12 years of experience

Agambling compulsion but did not make a recommendation for a downward departure pursuant to U.S.S.G ' 5K2.13. At sentencing, Sadolsky called three witnesses to establish the existence of a significantly reduced mental capacity based on his compulsive gambling. The trial court granted a two level downward departure to an offense level of ten and this resulted in a sentencing range of 6-12 months of imprisonment. Sadolsky was then sentenced to five years of probation with a special condition of probation of six months of house arrest. The government appealed the sentence imposed.

On appeal, the government argued that the district court erred in granting a two level downward departure pursuant to ' 5K2.13 based on Sadolsky's gambling problem. As part of this argument, the government contended that the district court erred in concluding that a gambling disorder was a permissible basis for departure under ' 5K2.13. Moreover, the government also argued that the district court erred in finding that Sadolsky proved, by a preponderance of the evidence, that he was entitled to a downward departure for diminished capacity.

The 6th Circuit concluded that after Amendment 583 to ' 5K2.13 in 1998, a gambling disorder could constitute a significantly reduced mental capacity. Moreover, ' 5K2.13 does not require a direct causal link between the significantly reduced mental capacity and the crime charged. Therefore, it would not be necessary for Sadolsky to be arrested for a gambling offense in order for his gambling compulsion to constitute a significantly reduced mental capacity. Thus, the district court's finding that Sadolsky had a gambling problem that qualified as a significantly reduced mental capacity was not clearly erroneous.

with GA. Moreover, Thomason used literature in his testimony that listed pathological gambling as an impulse control disorder.

The court found that Although testimony from a medically trained professional who was qualified to diagnose gambling disorders would have been preferable, . . . the trial court did not err in

finding that Sadolsky was a compulsive gambler who qualified for a downward departure under ' 5K2.13 based upon Thomason's testimony, the medical reference evidence, and the lack of contradictory evidence.@

United States v. Rapanos, 235 F.3d 256 (6th Cir. 2000).

Rapanos appealed the district court's denial of his 1999 motion for a new trial as well as his 1995 conviction for filling wetlands in violation of 33 U.S.C. ' 1311(a). The government cross-appealed Rapanos's sentence of three years probation. The 6th Circuit affirmed both the denial of Rapanos's motion for a new trial as well as his conviction.

The government's cross-appeal addressed two issues the first of which was the propriety of the district court's decision to award Rapanos a two level downward departure pursuant to USSG ' 2Q1.3(b)(1)(A) for an ongoing, continuous or repetitive discharge, release or emission of a pollutant into the environment.@ The district court also granted a two level downward departure under ' 2Q1.3(b)(4) which involves discharges without a permit or in violation of a permit.@

The 6th Circuit found that the district court abuses its discretion in departing from the guidelines when it takes into account a factor that is already considered by the Sentencing Commission and the guidelines. If a factor is not mentioned in the guidelines, the district court should consider whether it is sufficient to take the case out of the guidelines's heartland.@

The 6th Circuit held that the factors relied upon by the district court in its downward departure analysis were already adequately considered by the Sentencing

In 1988, White was indicted for raping his 13 year old step-daughter and he was represented by attorney McCrae. McCrae's performance at trial left a little to be desired; White was convicted, and was unsuccessful on direct appeal. White then filed a ' 2254 petition in which he claimed that McCrae's performance at trial deprived him of the effective assistance of counsel.

Commission and the guidelines. The district court provided no indication of any factors that take the case outside the heartland of environmental crimes not involving toxics, hazardous waste, or pesticides. Instead, the district court's decision to depart from the guidelines seemed based primarily on a fundamental disagreement with the sentencing guidelines pertaining to environmental criminals, that the district court made clear in announcing its final decision that Rapanos would receive no jail time.@ A fundamental disagreement with the law is not a permissible factor to consider in granting downward departures not provided for by the guidelines.

The second issue challenged by the government was the district court's decision to reduce Rapanos's offense level for acceptance of responsibility. The district court decreased the offense level even though Rapanos exercised his right to trial and was convicted by a jury. To justify its decrease, the district court stated that although the defendant put the government to its burden of proof at trial, it was not because he denied the factual element of his guilt, ie. altering the land, but, rather, he challenged whether the land qualifies as wetlands, ie. the applicability of the statute to his conduct.@

The 6th Circuit disagreed with the district court's assessment of the acceptance issue. The court analyzed the eight considerations in determining whether a defendant qualifies for an acceptance of responsibility decrease found in ' 3E1.1, n. 1 and concluded that Rapanos did not clearly demonstrate acceptance of responsibility.@ Therefore, the case was remanded for resentencing.

White v. McAninch, 235 F.3d 988 (6th Cir. 2000).

At an evidentiary hearing conducted in the district court, White testified that he met McCrae twice prior to trial - once for a few minutes following the arraignment and also on the morning of trial. In contrast, McCrae testified at the evidentiary hearing that he attempted to meet White a number of times prior to trial; however, White refused his visit.

McCrae also testified that he did not

seek or obtain discovery prior to trial because he was instructed by White not to file any pretrial motions. Furthermore, McCrae testified that he labored under the impression that the victim of the rape would not appear to testify at White's trial. However, on the Friday before the trial, McCrae learned that the victim would testify. Consequently, McCrae prepared a motion to suppress statements that White made to law enforcement after he was arrested. During this interview, White admitted that he had a sexual relationship with the victim. The motion to suppress statements was filed on the morning of trial and was denied by the trial court.

McCrae also failed to move for a pretrial pelvic examination of the victim because he felt that if a pelvic examination revealed penetration, it would suggest that White was responsible. Another justification for McCrae's failure to move for a pelvic exam was because White was charged with engaging in oral sex with the victim and not with engaging in intercourse.

Prior to trial, McCrae neither viewed a video-taped statement that the victim made to law enforcement nor the victim's video-taped statement that she made to the grand jury. In these statements, the victim stated that she had both oral sex and intercourse with White. McCrae's reasoning for not reviewing the tapes was that "as a matter of strategy that not seeing the tapes would better enable him to ambush the victim during cross-examination." However, after the victim "ambushed" McCrae by testifying that she had intercourse with White, McCrae moved for a pelvic examination. McCrae argued that this test would show that the victim was a virgin and that the pelvic exam would impeach her credibility with respect to her testimony about

On appeal, the Warden argued that McCrae's strategy was a prudent tactical decision in light of White's confession to the police that he had raped the victim. However, the 6th Circuit found that White's physical condition arguably affected his lucidity during his interview. Moreover, the court found that even deliberate trial tactics may constitute ineffective assistance of counsel if they fall

the uncharged act of sexual intercourse. The trial judge denied McCrae's request as untimely.

Even though White was only charged with engaging in oral sex with the victim, the prosecutor asked the victim if she had any sexual conduct with White other than oral sex. The victim responded that she also had intercourse with White. Even though the prosecution had limited the allegations to oral sex in the indictment, McCrae did not object to the question. Instead, McCrae proceeded to question the victim about the intercourse that she allegedly had with White.

Furthermore, several other witnesses testified about the uncharged sexual intercourse between the victim and White. McCrae also failed to object to this testimony. Finally, McCrae spent a considerable amount of his closing argument talking about the sexual intercourse incident and he attempted to convince the jury that the victim had lied. McCrae never requested an *in limine* instruction on the purpose for which the jury could use the victim's testimony about the intercourse incident.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the court set out a two-part inquiry to determine whether a counsel's assistance was constitutionally ineffective: "A showing of seriously deficient performance coupled with a showing that the deficient performance prejudiced the defense." The district court concluded that White's counsel was ineffective when he failed to object when the prosecutor elicited evidence about the uncharged sexual intercourse and he explored the intercourse incident in great detail on his examination of the victim as well as other witnesses. The Warden appealed to the 6th Circuit.

outside the wide range of professionally competent assistance.

The label "strategy" is not a blanket justification for conduct which otherwise amounts to ineffective assistance of counsel. The determination as to whether counsel's trial strategy amounts to ineffective assistance of counsel should be made with respect to the thoroughness of the pretrial investigation that

counsel conducted. The more thorough the investigation, the more deference the trial strategy receives, while strategic decisions made after incomplete investigations receive less deference.

There was nothing in the record to suggest that McCrae was aware of the uncharged sexual intercourse incident. Although McCrae indicated that White told him of a sexual relationship with the victim, White was not indicted for having intercourse with his step-daughter. McCrae did not conduct formal discovery in this case and was given no information by the prosecutor about the uncharged act. Finally, McCrae did not review, prior to trial, the video-tapes which contained information about the uncharged intercourse.

AMcCrae's woefully inadequate trial preparation renders it highly implausible that he developed his theory that the victim was lying about the uncharged act, and thus, the numerous episodes of oral sex as well, prior to trial. Indeed, a review of the trial record reveals that a much more likely scenario is that McCrae first learned of the victim's allegations with regard to the uncharged act when she answered the prosecutor's question about any activity other than fondling between her and White in the affirmative. . . . Abandoning his tactic to "ambush" the victim by not reviewing her video-tape prior to questioning her, McCrae sought leave to review the video-tape of her interview immediately after the state had completed questioning. Upon reviewing the tape, McCrae realized that the victim had given information about the intercourse incident.

Even if White was uncooperative with McCrae, McCrae should have viewed the video-tapes and would have learned about the allegation of sexual intercourse. AWhite's alleged non-cooperation simply does not exonerate McCrae's consistent pattern of neglecting his essential function of

The government predicated federal jurisdiction based on the fact that the photographic paper on which the pornography was produced was manufactured in Germany. Corp moved to dismiss the indictment and argued that the origin of the photographic

investigating the claims against his client.@ McCrae's strategy of failing to object and affirmatively eliciting testimony regarding an uncharged act of sexual intercourse between White and the victim fell well below an objective standard of reasonableness.

The court also found that White was prejudiced by McCrae's deficient performance. Evidence of uncharged acts is generally inadmissible unless it proves motive, opportunity, intent, preparation, etc. However, rarely does a defendant present evidence of a prior crime in support of his own defense. Even though the prosecutor limited its case to an oral sex encounter, the court failed to instruct the jury as to what purpose it could use the sexual intercourse incident. Thus, the 6th Circuit found that viewing the trial in its entirety, there was a reasonable probability that but for McCrae's deficient performance, White may have been found not guilty.

United States v. Corp, C F.3d C, 2001 WL 6158 (6th Cir. 2001).

Corp was 23 years old and lived in Big Rapids, Michigan and one day he brought film to a local pharmacy to be developed. The film developer noticed that some of the photographs contained pornographic poses of young females and he contacted the local police department. The local police department contacted the local high school principal to ascertain the identity of the females in the pictures. One of the females was 17 years old and was dating Corp while another of the females was Corp's 26 year old wife who was depicted engaging in sexual activity with the 17 year old.

The photographs were not distributed and were taken only after the 17 year old voluntarily posed. Corp was indicted for producing child pornography in violation of 18 U.S.C. ' 2251(a) and possession of child pornography in violation of 18 U.S.C. ' 2252(a)(4)(B).

paper was an insufficient nexus with interstate commerce based upon *United States v. Lopez*, 514 U.S. 549 (1995). The district court denied Corp's motion at which time he entered a conditional guilty plea to possession of child pornography.

On appeal, Corp argued that ' 2252(a)(B)(4) was unconstitutional on its face and as applied to him because it exceeded Congress=Commerce Clause powers. The 6th Circuit found that in *Lopez*, the Court explained that Congress may properly regulate three broad categories of activity under the Commerce Clause: (1) use of the channels of interstate commerce; (2) instrumentalities of interstate commerce or persons or things in interstate commerce, even though the threat may come only from intrastate activity; and (3) activities that substantially affect interstate commerce.

In subsequent cases, the Supreme Court suggested that courts should raise the following four questions in deciding a Commerce Clause controversy: (1) is the prohibited activity commercial or economic in nature?; (2) is there an express jurisdictional element involving interstate activity which might limit the statute=s reach?; (3) did Congress make findings about the effects of the prohibited conduct on interstate commerce?; and (4) is the link between the prohibited activity and the effect on interstate commerce attenuated?

The 6th Circuit applied the various tests to this case and assumed that ' 2252(a)(4)(B) was constitutional on its face. However, the court found that Corp=s activity was not of a type demonstrated substantially to be connected or related to interstate commerce. Under the undisputed facts, Corp was neither involved in, nor intended to be involved in the distribution or sharing with others of the pictures in question. The victim was neither an exploited child@ nor a victim in any real or practical sense. Moreover, Corp was neither alleged to be a pedophile nor was he alleged to have been illegally sexually involved with minors other than the victim who was one month away from becoming an adult.

The court found that clearly Corp was not the typical offender feared by Congress

Agents were watching the house into which the package was taken when the beeper emitted the signal indicating that the package had been opened. Agents entered the house and conducted a security sweep to locate the

that would be addicted to pornography and perpetuate the industry via interstate connections. Under these circumstances, the government failed to make a showing that Corp=s type of activity would substantially affect interstate commerce. Consequently, the court reversed Corp=s conviction on the ground that, reviewing the undisputed and unusual facts of this case, it was not persuaded that Corp=s activity had a sufficient nexus with interstate commerce.

United States v. Ukomadu, CF.3dC, 2001 WL 10271 (6th Cir. 2001)

Customs agents intercepted a suspicious package that had been express mailed from Thailand to Larry Cole at a Popeye=s Chicken Restaurant in Detroit. The package was x-rayed and appeared to contain kitchen utensils and cooking pots. However, the pots appeared to have unusually thick bottoms.

Customs agents opened the package and broke the bottoms of the pots and found 293 grams of heroin secreted therein. Most of the heroin was removed, the package was reassembled, and forwarded to a Postal Inspector in Detroit. A court order was obtained to implant a beeper in the package which would emit a signal when the package was opened. Moreover, a substance was sprayed on the pots and utensils that would produce a fluorescent glow when it was placed under black light. Finally, an anticipatory search warrant was obtained for Popeye=s Restaurant prior to the delivery of the package.

Ukomadu, the restaurant manager, was not at the restaurant when the package was delivered. Instead, an assistant manager at Popeye=s signed for the package and placed it in the back room. Ukomadu later arrived, picked up the package and drove to another individual=s house. Ukomadu entered the house and stayed for three hours after which he retrieved the package from his car and brought it into the house.

package and prevent the destruction of the drugs. A magistrate judge was then contacted to obtain a telephonic search warrant for the house. Before the warrant was executed, a black light to detect phosphorescent powder

was used on people who were located therein. Traces of the powder were found on Ukomadu's hand and clothing. The package, its contents, and documents showing that Ukomadu lived in a room at the residence were eventually seized pursuant to the search warrant.

Ukomadu was indicted for possession with intent to distribute and unlawful importation of heroin. Ukomadu moved to suppress the heroin on the grounds that no exigent circumstances existed at the time of the search and that agents should have obtained an anticipatory search warrant for the house in which the package was seized. The district court denied the motion to suppress after finding that the agents had an objectively reasonable belief that the narcotics would be destroyed once the package was opened and that the agents' actions, prior to the time when the warrant was obtained, did not constitute a search.

A jury convicted Ukomadu of possession with intent to distribute heroin and the district court assigned a base offense level of 26 based on the 293 grams of heroin found in the package. Ukomadu was sentenced to serve 72 months imprisonment and a four year term of supervised release. Moreover, Ukomadu was also ordered to pay more than \$150,000 in fines to cover the costs of his incarceration.

On appeal, Ukomadu alleged that the district court erred in denying his motion to suppress the heroin seized at the house. Ukomadu argued that the initial entry and his arrest were unreasonable and any evidence seized following the issuance of the telephonic search warrant should have been suppressed. Ukomadu argued that the package was destroyed within the time necessary to obtain a search warrant. The court applied a two-prong standard for evaluating a warrantless entry made to prevent the imminent destruction of evidence: Aa police officer can show an objectively reasonable belief that contraband is being, or will be, destroyed within a residence if he can demonstrate a reasonable belief that: (1) third parties are

Ukomadu also objected to the district court's determination of the amount of drugs used in calculating his sentence. When the

inside the dwelling; and (2) these parties may soon become aware the police are on their trail, or that the destruction of evidence would be in order.@

The mere possibility for the loss or destruction of evidence is an insufficient basis for a warrantless entry of the house to prevent the destruction of evidence. Instead, the police must have an objectively reasonable basis for their belief that the evidence will be lost or destroyed.

The 6th Circuit held that the district court properly concluded that the officers had an objectively reasonable belief that the destruction of drugs was imminent. Based on the continuous surveillance of Ukomadu, his car, and the house into which the package was taken, the agents clearly had reason to know that multiple people were in the home with the package. Moreover, it was also objectively reasonable to believe that modifications made to the package by Customs agents would immediately indicate to the people in the house that the package had been tampered with for the purpose of making arrests.

Finally, the 6th Circuit found that the examination of Ukomadu's hands and clothing under black light was not an unreasonable search under the 4th Amendment. Thus, the warrantless search was justified by exigent circumstances because the agents had an objectively reasonable belief that there were people in the residence and an objectively reasonable fear that the drugs would be destroyed.

Ukomadu also argued that he lacked the ability to pay the fine and costs of incarceration imposed by the district court.

The 6th Circuit held that Ukomadu's claim that the district court abused its discretion in ordering him to pay these costs. However, Ukomadu failed to object to the imposition of the fine and costs at the district court level. The 6th Circuit held that a defendant waives his right to appeal an application of the guidelines, which includes the imposition of fine and costs, when he fails to object at the district court.

package was first intercepted, Customs agents found 293 grams of heroin therein. The agents removed most of the heroin leaving

only approximately six grams in the package when it was delivered to Ukomadu.

Ukomadu was convicted of possession with intent to distribute heroin but acquitted of importation of heroin. Nonetheless, the district court determined that the 293 grams of heroin was the appropriate amount to use in sentencing Ukomadu. Ukomadu argued that because the package contained only six grams of heroin at the time he possessed it, six grams was the appropriate amount to use for sentencing.

The 6th Circuit ruled that Ukomadu would clearly have received the entire 293 grams of heroin contained in the original package but for the fortuitous intervention of the Customs agents. Ukomadu was personally involved as a participant who was the intended recipient of the package and he also took delivery of the package. Therefore, Ukomadu satisfied the requirements of the relevant conduct guideline (' 1B1.3) and was responsible for the entire quantity of heroin.

United States v. Harris, C F.3d C, 2001 WL 20782 (6th Cir. 2001).

Harris was convicted of a drug offense and the district court concluded that he had seven criminal history points based on his three prior convictions. In 1984, Harris was sentenced by a Tennessee state court to serve concurrent three year terms of imprisonment for two different offenses. Relying upon USSG ' 4A1.1(a), the district court assigned Harris three points for each of the 1984 convictions despite the fact that Harris was administratively paroled after only serving 18 days of incarceration. The reason for the administrative parole was that Tennessee was attempting to comply with a federal court order to correct over-crowded conditions in Tennessee's state correctional institutions.

On appeal, Harris argued that the district court erred by assigning six points for the 1984 sentences because the guidelines mandate that if part of the sentence of imprisonment was suspended, the sentence of imprisonment refers only to the portion that was not suspended.@ USSG ' 4A1.2(b)(2).

Curtis was serving a three year period of supervised release when he was alleged to have violated a number of the standard

Thus, Harris maintained that since he was paroled after serving less than three weeks in prison, his sentences were suspended and that the district court should have determined his criminal history category based on the 18 days that he served on the convictions. In contrast, the government argued that the number of criminal history points assigned to a defendant should be based on the sentence pronounced, not the length of time actually served.

The 6th Circuit found that in using the term Asuspended sentence@ in ' 4A1.2(b)(2), Congress was referring to the authority of a court, not a governmental agency, to suspend a sentence. Harris= administrative parole in 1984 was ordered by the Tennessee Department of Corrections and not the state court that sentenced him. Therefore, the 6th Circuit concluded that Harris= sentences were not Asuspended.@ Instead, he was simply paroled by the state to relieve over-crowded prison conditions.

Finally, Harris argued that the district court erred in refusing to depart downward pursuant to USSG ' 5K1.1 and ' 5K2.0 in calculating his sentence. To support his motion for a downward departure, Harris characterized his Aearnest efforts to cooperate with the authorities@ as a mitigating circumstance warranting this departure. However, the government did not move for a downward departure and there was no express agreement between the government and Harris to file a motion pursuant to ' 5K1.1.

The district court concluded that Harris= efforts did not justify a downward departure under ' 5K2.0. The 6th Circuit held that the district court's failure to depart from the guideline range is not cognizable on appeal when the district court: properly computed the guideline range; imposed a sentence that was not illegal or did not result from an incorrect application of the guideline range; and is aware that it had discretion to depart from the guideline range.

United States v. Curtis, C F.3d C, 2001 WL 20761 (6th Cir. 2001).

conditions of supervision. A magistrate judge presided over the initial hearing on the alleged violations and found probable cause that

Curtis violated three conditions of supervised release but that there was insufficient proof on two other alleged violations. Thus, Curtis was ordered to be held for a final revocation hearing before the district court on the three violations. The government appealed the magistrate judge's order finding insufficient evidence on the two alleged violations.

The district court entered an order reinstating the alleged violations that the magistrate judge dismissed and the government filed an amended petition. After conducting a final hearing, the district court found that Curtis violated all alleged conditions of his supervised release and imposed a term of imprisonment. Curtis timely appealed the district court's revocation order.

On appeal, Curtis alleged that the district court used an incorrect standard of review in reviewing the magistrate judge's probable cause findings. The 6th Circuit found that 28 U.S.C. ' 636 was promulgated to relieve some of the burden on the federal courts by permitting the assignment of certain district court duties to magistrates. 28 U.S.C. ' 636(b) creates two different standards of review that are to be applied by district courts when they review a magistrate judge's findings. The district court shall apply a clearly erroneous or contrary to law standard of review for non-dispositive issues. In contrast, dispositive motions, such as motions for summary judgment or for the suppression of evidence, are governed by a *de novo* standard.

Curtis argued that the magistrate court conducted a probable cause hearing pursuant to ' 636(b)(1)(A) and that the government's challenges to such findings should have been governed by the clearly erroneous standard. The 6th Circuit agreed and found that the rule granting authority to a magistrate judge to hold a probable cause hearing evinces that the magistrate's determination is a preliminary trial matter for the district court to review under the clearly erroneous standard.

The district court neither stated nor implied whether it was conducting the final

Loss under ' 2F1.1 means the actual or intended loss to the victim, whichever is

hearing under a clearly erroneous standard or a *de novo* standard. Moreover, the nature of the district court's comments during the hearing did not assist the 6th Circuit in arriving at a conclusion as to which standard was applied. Thus, the court remanded the case to allow the district court to examine the magistrate judge's findings under the proper standard.

United States v. DeSantis, C F.3d C, 2001 WL 23173 (6th Cir. 2001).

DeSantis pled guilty to bankruptcy fraud, money laundering, and tampering with a witness. The charges arose from DeSantis' filing of a bankruptcy petition in which he failed to disclose a sizable sum of net assets. The loss DeSantis intended to inflict was close to \$1,000,000.00 but the bankruptcy estate suffered no actual loss because the bankruptcy trustee discovered the hidden assets before the scheme to defraud was consummated.

At sentencing, the bankruptcy fraud and money laundering charges were grouped because a common criminal objective and a single harm connected them. The probation office determined that the base offense level was 25. However, DeSantis objected to the offense level and sought an additional three level reduction because the scheme to defraud was an attempt that had not succeeded. The district court agreed and reduced the offense level three additional levels and characterized DeSantis' conduct as an attempt pursuant to USSG ' 2X1.1.

The government appealed the sentence imposed and the 6th Circuit held that contrary to the district court's conclusion, *United States v. Watkins*, 994 F.2d 1192 (6th Cir. 1993) did not hold that the failure to complete all of the acts necessary to produce the full amount of the intended loss mandated the application of the three level reduction found in ' 2X1.1(b)(1) for attempted substantive offenses. Instead, whether the ' 2X1.1 reduction for an attempt applies is controlled by whether the defendant completed all the acts a defendant believed necessary for successful completion of the substantive offense as defined in the guidelines. greater. The court concluded that for the offense of bankruptcy fraud, filing the petition

is the forbidden act. Success of the scheme contained within the bankruptcy petition is not an element of the crime. Moreover, an unsuccessful scheme to defraud creditors of a given amount of money is not an attempted violation of 18 U.S.C. ' 157(1). Attempted bankruptcy fraud could arise only in the unusual situation of an unsuccessful attempt to file the bankruptcy petition itself.

Because DeSantis filed the bankruptcy petition for the purpose of executing or attempting to execute a scheme to defraud his creditors, he was guilty of the completed offense for the purposes of both the statute and the guidelines. Completion of the substantive offense under the guidelines renders the ' 2X1.1 attempt reduction unavailable. Therefore, the 6th Circuit concluded the district court erred by reducing DeSantis' offense level by three levels pursuant to ' 2X1.1(b)(1).

United States v. Brown, C F.3d C, 2001 WL 33043 (6th Cir. 2001).

Brown pled guilty to the statutes forbidding the production and possession of child pornography. An international investigation concluded that numerous individuals were using computer software called Internet Relay Chat (IRC) to trade in child pornography. One participant was Ian Baldock of England whose computer was seized by British authorities and found to contain thousands of images of child pornography. Baldock's computer also contained a set of rules for joining the IRC.

An individual identified only as Awavejump@ was found on the list of users of the IRC. After Awavejump@ learned of Baldock's arrest and that Baldock had failed to encrypt his computer, Awavejump@ typed in a chat room that AGod, I hope that he (Baldock) don't have any of my privates on there.@ This was a reference to Awavejump@s' private collection of child pornography.

British authorities advised United States Customs Service officials of Awavejump@ and further investigation determined that Brown posed as Awavejump@ on the IRC. Brown was arrested and his residence was searched. Several days later, one of Brown's victims, a child who Brown

had repeatedly molested, told police that after Brown learned of Baldock's arrest, he showed her a small silver gun and told her that if she told anyone about the molestations, he would put a bullet in her head. A search of Brown's residence yielded a gun matching the description given by the child.

The district court used Brown's threat to the child to enhance his offense level for obstruction of justice pursuant to USSG ' 3C1.1. On appeal, Brown argued that the obstruction adjustment did not apply because at the time he made the threat, the investigation had not yet focused on him because he had not yet been specifically identified as a suspect. Instead, only Awavejump@ had been identified as a suspect and Brown's true identity had not been unveiled.

The 6th Circuit rejected Brown's argument and found that when Brown made his threat, an investigation of the offense of conviction was in progress. The obstruction enhancement applies where a defendant engages in obstructive conduct with the knowledge that he is the subject of an investigation or with the belief that an investigation is probably underway. By the nature of the threats, Brown was clearly aware that he was under investigation.

Brown also appealed the two level enhancement pursuant to USSG ' 2G2.1(b)(3) because the district court found that a computer was used to solicit participation by a minor in sexually explicit conduct for the purpose of producing sexually explicit material. Brown contended that the use of a computer enhancement did not apply because he did not use a computer to solicit participation, in that he did not use it to ask minors to engage in sexually explicit conduct.

However, Brown gave his victims access to his computer. By doing this, Brown made these victims aware that other children were engaging in sexual conduct with adults on film. Thus, Brown's victims were given the impression that this was acceptable conduct which assisted Brown in continuing to film them.@ ABy using the computer to desensitize his victims to deviant sexual activity, Brown used it to solicit their

participation in that activity.@ The court concluded that Amisuse of a computer fits well within the conduct that was contemplated by Congress as well as the wording of USSG '

Task force agents placed an electronic transmitting device on a confidential informant to record a drug transaction with Murphy. The informant was provided \$500.00 in marked bills and placed under surveillance. Later that day, the informant paged Murphy and inquired about purchasing crack. The informant later met Murphy in a restaurant parking lot where Murphy told the informant Ahere=s five.@ The informant was then given \$500.00 worth of crack cocaine by Murphy who was in turn given \$500.00 cash.

A search of Murphy=s room yielded \$300.00 of the marked money and 7.2 grams of crack cocaine. A search of Murphy=s person yielded the balance of the marked money. In the face of these facts, Murphy elected to go to trial and a jury convicted him of both distribution of crack as well as possession with intent to distribute crack.

On appeal, Murphy contended that the district court erred by admitting Aother acts@ evidence in violation of the Fed. R. Evid. 404(b). The 6th Circuit employs a three-step analysis to review the district court=s ruling on the admissibility of 404(b) evidence. AWe first review for clear error the district court=s factual determination that the Aother acts@ occurred. Second, we examine *de novo* the district court=s legal determination that the evidence was admissible for a legitimate purpose. Finally, we review for abuse of discretion the district court=s determination that the probative value of the Aother acts@ evidence is not substantially outweighed by its unfair prejudicial effect.@

The other acts evidence took the form of the government=s opening statement during which the jury was told that Murphy sold drugs to someone else on a prior occasion. Moreover, the government called a rebuttal witness to testify that he engaged in a prior drug transaction with Murphy.

Murphy=s attorney objected to the government=s opening statement but the basis articulated for the objection was different from the 404(b) argument that was advanced

2G2.1(b)(3).@

United States v. Murphy, C F.3d C, 2001 WL 33051 (6th Cir. 2001).

on appeal. The 6th Circuit found that Murphy forfeited his 404(b) argument and limited its review to a Aplain error@ standard. APlain errors are limited to those harmful ones so rank that they should have been apparent to the trial judge without objection, or that strike at fundamental fairness, honesty, or public reputation of the trial.@

The court concluded that the prosecutor=s reference to the prior drug transactions in opening statement were not Aplain error.@ Furthermore, any error was cured by the district court=s cautionary instruction regarding the use for which the jury could use counsels= opening statements. Furthermore, the district court gave a cautionary instruction to apprise the jury of the limited purpose for which the prior bad act could be considered.

In determining whether the rebuttal witness was proper evidence, the court concluded that the district court improperly failed to analyze Athe other acts@ evidence before allowing the jury to hear the testimony. However, any error was harmless in light of the overwhelming evidence of Murphy=s guilt.

The next important issue considered by the 6th Circuit was Murphy=s challenge to the calculation of his criminal history category. Pursuant to USSG ' 4A1.1(b), two criminal history points are assessed for each prior sentence of imprisonment of at least 60 days. The commentary to ' 4A1.2 provides that Ato qualify as a sentence of imprisonment, the defendant must have actually served a period of imprisonment on such sentence.@

The district court assessed two criminal history points for each of Murphy=s two misdemeanor convictions for which he was sentenced to serve four months of imprisonment. Murphy argued that the district court erred in scoring these as two point convictions because he did not serve a term of imprisonment for either conviction. The government countered that both convictions were properly counted as two point convictions even if Murphy did not serve the

four month term of imprisonment that was indicated on the judgments.

The 6th Circuit held that the guidelines mandate that a defendant must serve at least some time in order for the conviction to be considered a sentence of imprisonment.® If a

The record was unclear as to whether Murphy served any time on the prior convictions. Therefore, the 6th Circuit remanded the case so that the district court could determine whether Murphy served any time for the misdemeanor convictions. If Murphy did not serve a single day for the misdemeanor convictions, the district court clearly erred by assessing two points for each conviction. However if Murphy served at least one day of the four month imprisonment term, then the district court properly determined that the misdemeanors were two point convictions.

United States v. Boucha, C F.3d C, 2001 WL 37717 (6th Cir. 2001).

Boucha pled guilty to eight counts of armed bank robbery and one count of using a firearm during and in relation to a crime of violence. During each robbery, Boucha would demand the keys to a nearby automobile from one of the bank employees and then he used the vehicle as his get-away-car. Even though Boucha never forced a teller to leave the bank or to ride with him, the district court increased his offense level pursuant to the carjacking enhancement found in USSG ' 2B3.1(b)(5). The guidelines define carjacking as the taking or attempted taking of a motor vehicle from the person or presence or another by force and violence or by intimidation.®

On appeal, Boucha claimed that the carjacking enhancement was inapplicable because he did not take the vehicles from the person or presence® of the victims. Instead, Boucha merely took the keys to the cars from the bank employees.

The 6th Circuit held that because the Sentencing Commission added the carjacking section to the robbery portion of the Sentencing Guidelines and utilized common law robbery language in its definition, it was appropriate to interpret the carjacking enhancement with common law robbery principles in mind. Consequently, the court

defendant served a portion of the sentence, then for the purposes of calculating a defendant's criminal history category, the focus is on the actual sentence pronounced, not the actual length of time served.

held that a property is in the presence of a person if it is so within his reach, observation and control that he could, if not overcome by violence or prevented by fear, retain possession of it. Presence requires a significant degree of nearness without mandating that the property be within easy touch; it must be accessible.®

In this case, Boucha brandished weapons, took keys and eventually stole cars from frightened victims. Moreover, the cars were parked just outside of the banks that were robbed. Were it not for Boucha's actions and his use of fear and intimidation, the victims would have maintained control of their cars. Thus, the application of the 2 level enhancement was affirmed.

United States v. Carter, C F.3d C, 2001 WL 40376 (6th Cir. 2001).

Carter was charged with armed bank robbery and one of the government's key witnesses was Terri Halliburton who was a teller in the bank that was robbed. During her direct examination, Halliburton identified Carter as the man who robbed the bank. However, on cross-examination, Halliburton testified that two days after the robbery, she saw a news clip of a police chase that showed a picture of Terry Johnson who was eluding capture on a crime that was unrelated to the bank robbery. Nonetheless, Halliburton identified Johnson as the bank robber and called law-enforcement to report that she had seen a picture of the man who had robbed the bank on the T.V. news feature.

Prior to seeing the news clip, Halliburton had not viewed a photo spread of any potential suspects. Moreover, Halliburton was not requested to examine a photographic array until nearly two years after the robbery. When Halliburton was requested to examine a photographic array, she declined to look at the pictures because she knew the trial was coming up and she just didn't feel comfortable looking at a whole bunch of pictures.®

Moreover, Halliburton stated that she didn't want to look at anything else that might confuse her.

Halliburton testified that when she arrived to testify at Carter's trial, she believed that she was going to identify Johnson as the robber. However, prior to testifying, Halliburton changed her identification after the case agent told her that Ait was the right name but the wrong face on the news clip.

During defense counsel's closing

On the second day of deliberations, the jury sent the district court a message asking whether it could base its verdict upon circumstantial evidence without basing it on an eyewitness identification. The district court responded that a jury could base a verdict upon circumstantial evidence but only if that circumstantial evidence convinced it beyond a reasonable doubt that the defendant was guilty of the crime charged in the indictment. One hour later, the jury convicted Carter.

Carter raised four issues on appeal but the 6th Circuit focused on the one in which Carter claimed that his conviction must be reversed because of prosecutorial misconduct during his rebuttal argument. Carter based this argument on the fact that the prosecutor misstated the testimony of Halliburton. Moreover, Carter alleged that the prosecutor mislead the jury by insisting that defense counsel was lying about Halliburton's testimony.

The 6th Circuit used a two-step approach for determining when prosecutorial misconduct warrants a new trial. Under this approach, the court must first determine whether the prosecutor's remarks were improper. If the remarks were improper, the court must weigh four factors in determining whether the impropriety was flagrant and warranted reversal. These four factors are whether the: (1) remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) remarks were isolated or extensive; (3) remarks were deliberately or accidentally made; and (4) evidence against the defendant was strong.

Because defense counsel did not object to the prosecutor's statements at trial, the court

argument, he pointed out the evolution of Halliburton's in court identification. During his rebuttal, the AUSA accused Carter's lawyer of lying in his closing argument. Moreover, the AUSA also misrepresented evidence in his rebuttal by insisting that Halliburton did not testify that the case agent told her that Ait was the right name but the wrong face before she took the stand. Defense counsel never objected to the rebuttal argument.

employed a plain error standard of review. To succeed under the plain error standard, the defendant must show that: (1) there was error; (2) the error was plain or obvious under the current law; and (3) the error affected his substantial rights. This requires the defendant to establish that the error was prejudicial and that it affected the outcome of the district court proceedings.

If the defendant satisfies this three-prong test, the court of appeals should exercise its discretion to remedy the error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

The court concluded that the prosecutor's conduct during the rebuttal argument was error that was plain. While counsel has the freedom to argue reasonable inferences from the evidence, counsel cannot misstate evidence or make personal attacks on opposing counsel. In this case, the prosecutor incorrectly stated that Halliburton did not admit being told by the case agent that she made a mistake in identifying the robber. However, Halliburton conceded three times that the case agent told her that Ashe made a mistake in her identification of the robber. Thus, the prosecutor clearly misrepresented material evidence by asserting that Halliburton had not been told Ait was the right name but the wrong face. The court also found that it was plain error for the AUSA to make personal attacks on an opposing counsel.

The court proceeded to evaluate the third prong of the plain error analysis to determine whether the prosecutor's actions affected Carter's substantial rights and warranted reversal. The court concluded that the prosecutor's comments were likely to

mislead and prejudice the jury. A prosecutor's misrepresentation of material evidence can have a significant impact on jury deliberations because a jury generally has confidence that a prosecuting attorney is faithfully observing his obligation as a representative of a sovereignty.

The court proceeded to analyze the four factors to determine whether the misconduct warranted reversal. The court held that Carter was prejudiced by the misconduct. Moreover, the prejudice could have been cured, or at least minimized, by curative instructions to the jury. However, none of the jury instructions given at the trial sufficiently cured the prejudice caused by the prosecutor's actions. The court's general instruction that objections or arguments made by the lawyers are not evidence in the case was given along with other routine instructions for evaluating the evidence presented at trial.

However, this instruction was not given at the time of the prosecutor's improper comments. Instead the instruction was given after closing arguments had been completed and after a 15 minute recess. Therefore, there was nothing directly linking this instruction to the prosecutor's misconduct. The court concluded that measures more substantial than a general instruction that objections or arguments made by lawyers are not evidence in the case were needed to cure the prejudicial affect of the prosecutor's comments during closing arguments.

The court then applied the second factor and concluded that the prosecutor's comments were extensive and infected the entire trial. The prosecutor made the improper comments during rebuttal argument and therefore they were the last words from an attorney that were heard by the jury before deliberations.

The court proceeded to apply the third factor and found that the prosecutor's comments were deliberately placed before the jury. The proper course of action for an attorney who takes issue with comments made by opposing counsel is for that attorney to object to the offensive comments, not to respond with equally offensive comments.

Moreover, the misrepresentation had an even greater potential for misleading the jury because the misstated evidence was central to government's case. Halliburton was the only witness who could identify Carter as the robber.

The prosecutor did not object to what he believed was a mischaracterization of Halliburton's testimony. Moreover, the prosecutor did not refute defense counsel's closing argument by pointing to contradictory evidence presented at trial.

Instead, the prosecutor repeatedly claimed that defense counsel was telling a colossal lie. Rather than properly objecting to what he believed were improper statements made by defense counsel, the prosecutor simply committed another clear wrong and thereby eliminated any possibility that the district court could correct defense counsel's wrongs with a curative instruction.

The fourth and final factor was the strength of the evidence against Carter. While there was sufficient circumstantial evidence presented at trial to support the jury's verdict, this evidence was not so strong as to overcome the improper and inflammatory comments made by the prosecutor. The court found that there was some evidence indicating that Johnson may have been the robber while there was certainly circumstantial evidence indicating that Carter may have robbed the bank. Thus, the court concluded that the evidence against Carter was not overwhelming. Because Carter satisfied all four factors, he demonstrated prejudice and was entitled to relief under a plain error analysis.

United States v. Burke, C F.3d C, 2001 WL 43778 (6th Cir. 2001).

Burke was convicted of two counts of armed bank robbery and one count of carrying a firearm during and in relation to a crime of violence. All diagnostic physicians agreed that Mrs. Burke was competent to stand trial but that she had serious mental problems that required treatment.

At sentencing, the district court found that Burke acted with a diminished mental capacity and departed from the otherwise

applicable guideline range on the bank robbery offenses pursuant to USSG ' 5K2.13.

However, the district court refused to depart on the ' 924(c) offense after finding that a departure below the five year statutory minimum sentence was not authorized without a motion filed by the government. Consequently, the district court imposed a five year consecutive sentence on the ' 924(c) charge. Burke appealed the district court's failure to depart on the ' 924(c) offense.

The 6th Circuit held that a departure

Doan was charged with murder and child endangerment. When Doan was confronted with the child's death, he gave the police two different versions as to how the child might have died. After considering the evidence, the jury found Doan guilty of both murder and child endangerment

Following Doan's conviction, but prior to sentencing, his attorney interviewed the jurors. During the trial, Doan testified that on the evening that the child died, he did not see bruises on the child because the bathroom was too dark. After hearing this testimony, a juror informed counsel that she conducted an experiment in her home during the trial to see if Doan was telling the truth.

The juror put lipstick on her arm to simulate the bruise and attempted to view the lipstick in a room lit similarly to the room that the child was in the evening that she died. The experiment confirmed the juror's belief that one could see bruises in such lighting. The juror then informed other members of the jury of her experiment during deliberations. The juror also admitted that during deliberations, she used a dictionary to look up definitions of 'purposeful' and 'intent' to clarify her understanding of those words.

Doan filed a motion for a new trial and alleged juror misconduct as one basis for the motion. The motion was denied and Doan was sentenced accordingly. Doan's conviction was affirmed on appeal wherein the Ohio appellate court found that while the juror's conduct was improper and may have been prejudicial, Ohio R. Evid. 606(B) made the juror's post-trial affidavit inadmissible as a basis for granting a new trial. The Ohio

below a statutory mandatory minimum is not authorized without a motion for a downward departure filed by the government pursuant to either ' 5K1.1 and/or 18 U.S.C. ' 3553(e). Where a statutory mandatory minimum sentence and the guidelines conflict, the guidelines must yield, and the statutory minimum sentence prevails. Therefore, the 6th Circuit affirmed the district court's refusal to depart below the statutory minimum sentence.

Doan v. Brigano, C F.3d C, 2001 WL 43063 (6th Cir. 2001).

Supreme Court declined to review Doan's conviction.

Doan then filed a ' 2254 petition which was denied by the district court. The district court concluded that the juror misconduct claim was barred because the Ohio appellate court relied on an adequate and independent state ground, Ohio R. Evid. 606(B), to dispose of the claim.

However, the 6th Circuit found that Ohio R. Evid. 606(B) could not serve as an adequate basis for the state court's decision. A state court's decision on a question of state law is adequate to support its judgment only if the state law basis for the decision is sufficient by itself to support the judgment, regardless of whether the federal law issue is affirmed or reversed. The 6th Circuit held that Ohio R. Evid. 606(B) was not an adequate or independent basis for the state court's decision because the application of Ohio R. Evid. 606(B) prevented Doan from showing that his federal constitutional right to a fair and impartial jury that considered solely the evidence presented at his trial was violated. The Supremacy Clause forbids a state from using a state rule to trump the fundamental requirements of the Constitution.

Under ' 2254, habeas relief may not be granted with respect to any claim adjudicated on the merits in state court unless the adjudication resulted in a decision that was: (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

In the Ohio appellate court, Doan argued that the juror's experiment violated his 6th Amendment right to have a fair trial before an impartial jury in which the verdict was based solely upon the evidence presented at trial. However, the appeals court did not address this argument in its opinion. Instead,

The 6th Circuit found that Ohio R. 606(B) codifies the Aaliunde rule@ which effectively states that the verdict of the jury may not be impeached by testimony of a member of the jury unless a foundation for such evidence is first laid by competent evidence from some other source.@ In contrast, Fed. R. Evid. 606(b) does not codify the Aaliunde rule.@ Instead, Fed. R. Evid. 606(b) allows a juror to testify about any Aextraneous prejudicial information that was improperly brought to the jury's attention.@

By failing to address Doan's 6th Amendment argument in its analysis, the Ohio appellate court implicitly held that Ohio R. Evid. 606(B) trumped the constitutional argument that Doan raised. Thus, the Ohio appellate court's application of Ohio R. 606(B) denied Doan of his right to confront the witnesses and the evidence against him and clearly stood in conflict with the Supreme Court precedent recognizing the fundamental importance of these constitutional rights.

What triggers the constitutional issue in this case is that a juror conducted an out-of-court experiment and reported her findings to the jury in the manner of an expert witness. However, unlike an expert witness, the juror's testimony was neither presented on the witnesses stand nor subjected to cross-examination by Doan's attorneys. Instead, the juror's experiment and report of its results injected extraneous and prejudicial evidence into the deliberations which Doan had no chance to refute.

However, even after finding that the extraneous influence on the jury amounted to constitutional error, habeas relief can only be granted if the error was not harmless. A habeas petitioner must show that Athe trial error had a substantial and injurious effect or influence in determining the jury's verdict.@ Thus, Doan must be able to establish that the results of the juror's experiment, having been

the court based its decision entirely on Ohio R. Evid. 606(B) which mandates that in order for a juror to give testimony about an extraneous influence, there must be some independent evidence from a source of first hand knowledge other than the jurors themselves.

displayed to other members of the jury, substantially affected or influenced the jury's verdict.

The court held that the jury's consideration of the extraneous material was harmless error because Athe significant holes and inconsistencies in Doan's testimony show that the juror experiment regarding her ability to see lipstick on her arm in a darkened room would not substantially affect or influence the jury's view that Doan was not a credible witness nor would it similarly affect or influence the jury's ultimate verdict.@

United States v. Mise, C F.3d C, 2001 WL 46871 (6th Cir. 2001).

Mise made a bomb for Ralph Case who wanted to use it to retaliate against another individual. However, after Ralph placed his order for the bomb, he checked himself into a drug rehabilitation program to combat a drug addiction and to prevent himself from harming this individual.

When the bomb was finished, Mise contacted Diana Case, Ralph's mother, to inform her that he made a bomb for Ralph. Ralph's brother Norman Case stored the bomb for Ralph before attempting to sell it to an undercover ATF agent. Norman was indicted for possession of a pipe bomb and entered a plea agreement with the government. As part of the agreement, Norman recorded a conversation with Mise wherein Mise explained how to use the bomb against the other individual.

Mise was indicted for manufacturing and possessing an unregistered pipe bomb. During his trial, Mise testified that he fabricated the story about making the bomb and agreed to make one for Norman so that Norman would leave him alone. Mise also testified that he was just Areciting things that he had read from various books and heard on the news.@ Finally, Mise testified that he neither made the bomb with which Norman

was found in possession nor was he ever in possession of a pipe bomb.

At the conclusion of the government's case, Mise moved to dismiss the indictment because the government failed to prove all of the essential elements of the crime charged. Mise was charged with violating 26 U.S.C. ' 5861(d)-(f) and failure to register the bomb is an essential element of these sections.

Mise argued that pursuant to 26 U.S.C. ' 5812(a), an application to transfer and register shall be denied if the transfer or possession of the bomb would place the transferee in violation of the law.⁶ Mise contended that he could not have registered the pipe bomb because Ohio law prohibits the possession of a dangerous ordinance⁷ such as

At sentencing, the district court enhanced Mise's offense level because he obstructed justice pursuant to USSC ' 3C1.1. This enhancement was based on the district court's conclusion that Mise perjured himself during the trial.

In order for a district court to properly enhance a defendant's offense level for committing perjury in his trial testimony, the court must first identify those particular portions of the defendant's testimony that it considers to be perjurious, and second, it must either make specific findings for each element of perjury or at least make a finding that encompasses all of the factual predicates for a finding of perjury.⁸ After reviewing the record and the contents of Mise's testimony, the 6th Circuit found that the district court did not err in enhancing his offense level pursuant to ' 3C1.1.

The final argument raised in this appeal was that the district court erred by applying a four level enhancement for possession or transfer with knowledge, intent, or reason to believe that the pipe bomb would be used or possessed in connection with another felony pursuant to USSC ' 2K2.1(b)(5).

Mise argued that there was no evidence to suggest that Norman Case intended to use the pipe bomb during the commission of another felony. Moreover, Mise claimed that any knowledge that he had regarding Ralph Case's plan to use a bomb to

a bomb. Thus, given the requirements of Ohio law, Mise maintained that due process barred his conviction because the statute punishes his failure to register while the registration was precluded by state law.

The 6th Circuit found that although Ohio law does prohibit the possession of bombs generally, this prohibition does not extend to bombs registered in the national firearms registration.⁹ As such, the Ohio legislature permits possession of federally registered bombs. Thus, because Mise did not present evidence that he made an application to register his pipe bomb or that the registration was a legal impossibility, his argument was rejected.

harm another individual became irrelevant when Ralph abandoned his plan. However, the 6th Circuit rejected this argument because there was no evidence that Mise knew that Ralph had abandoned his plan. Furthermore, there was plenty of evidence to suggest that Mise had knowledge or intent to produce the bomb with the intent to harm another.

United States v. Johnson, 2001 WL 58500 (6th Cir. 2001).

Johnson was convicted in 1992 of a drug offense and did not file a direct appeal. However, five years later while Johnson was still serving his sentence, he filed a petition for a writ of error *coram nobis* seeking to have his 1992 conviction vacated. The district court denied Johnson's petition and he filed a notice of appeal 18 days later.

The question presented in this case was whether Johnson's appeal should be treated either as a civil appeal under Fed. R. App. P. 4(a) or as a criminal appeal under Fed. R. App. P. 4(b). If the criminal rules applied, the notice of appeal was required to be filed within 10 days of the filing of the district court's dismissal order. In contrast, if the civil rules applied, the notice of appeal could be filed up to 60 days after the filing of the dismissal order.

The court found that at common law, the writ of error *coram nobis* was used as a device for correcting fundamental errors in both civil and criminal cases. However, the use of the writ was suspended in civil cases

with the promulgation of Fed. R. Civ. P. 60(b). The writ has survived in the criminal context under the All Writs Act found at 28 U.S.C. ' 1651.

A writ of error *coram nobis* may be used to vacate a federal conviction after the petitioner has served his sentence and relief is unavailable under ' 2255. The court found that although a *coram nobis* petition is a step in a criminal proceeding, it is, at the same time, civil in nature and subject to the civil rules of procedure.[@] Because Johnson's notice of appeal was filed within 60 days of the dismissal order, the 6th Circuit ruled that it had jurisdiction over his appeal.

The 6th Circuit then found that a writ of error *coram nobis* is an extraordinary writ that can be used only to review errors of the most fundamental character -- errors rendering

In 1986, Simpson was charged with first degree felony-murder under Michigan law. At trial, Simpson's co-defendants identified him as a perpetrator in the robbery in which a person died. Simpson was convicted and sentenced accordingly.

Simpson was unsuccessful on both direct appeal as well as his collateral attack of his state conviction in the state courts. Consequently, Simpson filed a ' 2254 petition in which he raised issues that the state courts had found were procedurally barred. The district court denied Simpson's habeas petition and he appealed to the 6th Circuit.

Because Simpson filed his ' 2254 petition after the AEDPA was enacted, the court applied the following relevant provisions: habeas relief may not be granted with respect to any claim adjudicated on the merits in state court unless the adjudication resulted in a decision that was: (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Thus, in order for a habeas petitioner to succeed under the unreasonable application[@] prong, he must prove that the relevant state-court decision applied clearly established federal law both incorrectly and unreasonably.

the proceedings themselves invalid. To be entitled to relief, the petitioner must demonstrate (1) an error of fact; (2) unknown at the time of trial; (3) of a fundamental unjust character which probably would have altered the outcome of the challenged proceeding if it had been known.

However, the writ of error *coram nobis* is available only when a ' 2255 motion is unavailable -- generally, when the petitioner has served his sentence completely and is no longer in custody as required for ' 2255 relief. Because Johnson remains a prisoner in federal custody, the court held that he was not entitled to *coram nobis* relief. Consequently, the 6th Circuit affirmed the dismissal of Johnson's petition for writ of error *coram nobis*.

Simpson v. Jones, CF.3dC, 2000 WL 1828733 (6th Cir. 2000).

In this case, the district court concluded that a majority of Simpson's claims were barred by the doctrine of procedural default based on a Michigan procedural rule. A habeas petitioner procedurally defaults claims if he has not presented those claims to the state courts in accordance with the state's procedural rules.[@]

A procedural default analysis is two-fold: the federal court must determine if a petitioner failed to comply with the state procedural rule; and it must also analyze whether the state court based its decision on the state procedural rule.[@] When a petitioner procedurally defaults a claim in state court, that default carries over to federal court and precludes habeas review of that claim. Moreover, in order for the procedural default bar to preclude habeas review, the last state court rendering a judgment must have based its judgment on the procedural default.

An exception to the procedural default rule is recognized when the prisoner demonstrates cause for noncompliance with the state's procedural rule and actual prejudice arising from the alleged constitutional violation, or a showing of a fundamental miscarriage of justice. Another exception to the default rule exists if the last state court rendering judgment adjudicated the claim on its merits instead of relying on the procedural default ground.

The court held that most of Simpson's claims were properly procedurally defaulted by the district court. Moreover, Simpson established neither cause that would excuse his default, nor the existence of either actual prejudice or a fundamental miscarriage of justice to excuse the default.

On two of Simpson's habeas claims, the state court denied relief using alternative grounds by reaching both the procedural default question as well as the underlying substantive merits of the claims. Consequently, Simpson maintained that because the Michigan Court of Appeals adjudicated the claims in the alternative, the court adjudicated the merits of the underlying claims and they were not procedurally defaulted under *Harris v. Reed*, 489 U.S. 255 (1989).

However, the 6th Circuit rejected this argument and ruled that *Harris* only applies

Harris and Gaines were charged with a variety of federal crimes. The issue presented in this case was framed by the government's decision to charge the defendants with murder.

However, the indictment failed to specify whether the charge was either first or second degree murder. The district court interpreted the indictment's lack of specificity to mean that the defendants were charged with second degree murder in violation of 18 U.S.C. ' 1111. The defendants recognized their good fortune and immediately pled guilty to second degree murder.

The offense level for second degree murder is 33. However, the district court assigned an offense level of 43 which was consistent with a conviction for first degree murder. To arrive at this result, the district court relied on a cross-reference found in USSG ' 2B3.1(c)(1). This cross-reference found in the robbery guideline provides that 'If a victim was killed under circumstances that would constitute murder under 18 U.S.C. ' 1111, . . . apply ' 2A1.1 (First Degree Murder).@

Based on 6th Circuit precedent, the district court concluded that it was obligated to apply the cross-reference because the killing occurred during the commission of another felony, the attempted robbery of the

when a court mentions a state procedural default but bases its decision primarily on federal substantive law or on a holding that is interwoven with federal substantive law.@ In contrast, when a court issues a ruling where it alternatively rejects claims both on procedural and substantive grounds, the claim is procedurally defaulted and cannot be raised on habeas review. Thus, the 6th Circuit concluded that the state court did not unreasonably apply the doctrine of procedural default to this case.

Harris v. United States, CF.3dC, 2001 WL 69043 (6th Cir. 2001).

Harris and Gaines intended to rob a convenience store located on a U.S. Army base. While approaching the store, Harris and Gaines encountered two soldiers at which time Gaines brandished a gun that discharged, killing one of the soldiers.

convenience store. The 6th Circuit affirmed the district court's application of the cross-reference and concluded that because the killing occurred during the course of the attempted robbery, the appropriate base offense level was 43. The court concluded that this case did not present an *Apprendi* issue because the sentence imposed did not exceed the statutory maximum for the second degree murder offense charged in the indictment.

United States v. Bandy, CF.3dC, 2001 WL 69052 (6th Cir. 2001).

Bandy and Jones robbed a bank in Tennessee and during the robbery, Jones carried a short-barreled shotgun while Bandy appeared to have a black semi-automatic pistol which later proved to be a pellet gun. However, the plan was imperfect as evidenced by the discovery of the getaway car by law-enforcement in which a pawn ticket with Bandy's name was found.

Bandy and his confederates were later arrested and found in possession of the booty and weapons. To complicate matters, Bandy confessed that he, Jones and Webb, a getaway driver, planned and executed the bank robbery. Bandy was tried and convicted of armed bank robbery, using and carrying a firearm during and in relation to a crime of

violence, and aiding and abetting. The indictment did not specify the type of firearm that Bandy used and carried. Instead, at sentencing, the district court found, by a preponderance of the evidence, that the gun carried by Bandy was a short-barreled shotgun. Consequently, the district court imposed a 10 year mandatory sentence pursuant to ' 924(C)(1)(B)(i).

At trial, the government elicited testimony that the weapon worked properly when it was tested. Nonetheless, on appeal, Bandy claimed that there was insufficient evidence to convict him of using and carrying a firearm because the government failed to prove that the weapon was operable on the day of the robbery. Firearm is defined as any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive. The 6th Circuit found that contrary to Defendant's

Bandy next claimed that the district court clearly erred by concluding that the weapon used in the robbery was a short-barreled shotgun. A witness identified the shotgun as the weapon used in the robbery based on its unique markings. Moreover, Bandy confessed that the shotgun was carried by Jones during the robbery. Even though the overall length of the weapon was 28 inches, the length of the barrel was approximately 13 inches. The court rejected Bandy's argument after concluding that a barrel length of less than 18 inches brings the shotgun within the proscription of the statute, regardless of the overall length of the weapon.

Finally, Bandy raised an *Apprendi* argument and maintained that the district court erred by imposing a mandatory minimum 10 year sentence for the firearm offense based on its finding, by a preponderance of the evidence, that a short-barreled shotgun was used in the bank robbery. Normally, a defendant convicted of violating ' 924(c) is subject to a mandatory five year sentence. However, under the statute, if a specified type of firearm is used, the mandatory sentence increases. For example, using a short-barreled gun mandates a ten year mandatory minimum while using a machine gun yields a thirty year mandatory minimum.

contention, a firearm need not be operable to satisfy the definition of firearm under 18 U.S.C. ' 924(a)(3).

The court also held that even though Bandy did not actually possess a firearm during the robbery, there was sufficient evidence to sustain his firearm conviction. A defendant is liable as an aider and abettor for the use of a firearm during and in relation to a crime of violence when his accomplice uses a firearm in relation to jointly undertaken criminal activity. The court viewed the evidence, in the light most favorable to the government, and concluded that Jones carried a short-barreled shotgun into the bank during the robbery. The loaded gun was later found and test fired, and it fired properly. Therefore, there was sufficient evidence to sustain Bandy's aiding and abetting conviction on the firearm offense.

The 6th Circuit found that the type of gun used to commit the crime was an element of the crime that must be pled in the indictment and proven beyond a reasonable doubt. The type of gun was not merely a sentencing factor that could be proven by a preponderance of the evidence at the sentencing hearing. Thus, the 6th Circuit held that the district court erred by imposing a ten year mandatory minimum sentence after finding that a short-barreled gun was used by Bandy. Consequently, the case was remanded to the district court.

United States v. Brogan, CF.3dC, 2001 WL 76727 (6th Cir. 2001).

Brogan worked as an assistant treasurer for Champion Enterprises. One of Brogan's main tasks for Champion was to set up wire transfers. Brogan received instructions from his supervisors about financial transactions that they wanted completed. Brogan would format these transactions on his computer for receipt by the electronic funds transfer system. Brogan would then give the properly formatted information to one of the four supervisory personnel authorized to execute the transfer. While employed with Champion, Brogan opened a bank account in the name of Champion Companies. Along the way, Brogan arranged for the transfer of

almost \$8,000,000 from Champion Enterprises to the Champion Companies bank account that he controlled. When he was initially questioned about the transfer, Brogan informed the supervisor that Ait was a pay-down on a revolving line of credit.@ However, several weeks later, once the money was securely under his control and after his shopping sprees had commenced, Brogan was confronted by his superiors about the transfer and he confessed his indiscretion.

Brogan pled guilty to bank fraud and in the plea agreement, an offense level of 23 was stipulated. Nonetheless, in the presentence report, Brogan's offense level was 25 due to the decision of the probation office to apply the abuse of position of trust enhancement found at USSG ' 3B1.3.

Both Brogan and the government objected to the application of this enhancement. However, the district court relied on the following factors to apply the abuse of position of trust enhancement: (1) Brogan's job description; (2) the willingness

The 6th Circuit concluded that the district court erred by applying the enhancement based on the crime that was committed instead of inquiring into the A inherent nature of Brogan's work.@ The court conceded that A there is no doubt that Champion trusted Brogan despite his short service with them.@ Nonetheless, the court found that A there was insufficient evidence of the existence of a fiduciary-like relationship that gave him (Brogan) the capacity to perpetrate his fraud.@

The court held that A the lower court placed too little emphasis on the authority and discretion that Brogan's job actually entailed when it inquired if he had violated the heightened duty of trust implicated by ' 3B1.3. This enhancement is meant to discourage violations of the kind of trust we show to our fiduciaries and public officialsBand we conclude that the misplaced reliance and lack of supervision Champion showed toward Brogan was not this sort of institutionalized and necessary trust relationship.@

Summary of Defense Victories

of his superior to believe Brogan's explanation for the wire transfer; and (3) the sheer size of the theft.

On appeal, the government and Brogan continued to argue that the district court erred by applying the abuse of position of trust enhancement. The 6th Circuit held that Aa position of trust under the guidelines is one characterized by professional or managerial discretion.@ Normally, A persons holding such positions are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature.@ The level of discretion A accorded an employee is to be the decisive factor in determining whether his position was one that can be characterized as a trust position.@ The rationale for the enhancement is more akin to punishment for violating a fiduciary duty, which is a higher duty than the one normally placed on employees who breach this duty by their conversion of company assets.

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